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LOS ANGELES. CAL.

A MANUAL

OF

ELEMENTARY LAW

BEING A SUMMARY OF

THE WELL-SETTLED ELEMENTARY PRINCIPLES
OF AMERICAN LAW

BY

WILLIAM P. FISHBACK

LATE DEAN OF THE INDIANA LAW SCHOOL

FOURTH REVISED IMPRESSION

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PREFACE.

In this manual an effort has been made to put the reader in possession of a summary of the well-settled elementary principles of the law, by stating them dogmatically in language as simple as the subject admits of. After all that is said derisively about the glorious uncertainty of the law, there are many rules of civil action regulating the political, business and domestic relations of life which may be said to be settled. It has been the effort in these pages to collect these rules from authoritative sources and print them in a form at once comprehensive and compact. What may be objected to as a defect I count one of the chief merits of the book, viz., the absence of notes and citations. There is no claim to originality except in the matter of the method of stating and arranging the materials which have been accumulated by the labors of others. The fruit of these labors has been appropriated with freedom and without compunction, and it is my belief that no rule of law is stated which is not supported by adequate authority. It would have been an easy matter to swell the size of the volume by a collection of foot-notes and a list of decided cases; but for the beginner I believe that such citations tend to confuse, rather than to instruct. Of course, this does not

apply to advanced students, or to those who are pursuing a post-graduate or university course of technical professional instruction, but it is relevant to the vast majority of beginners who are to make up the bulk of the legal profession.

The book may have its use in other fields. The general reader may find here in outline a statement of the sources and foundations of the laws under which we live, as well as many rules and principles of business which may serve to admonish and guide him in the performance of the duties of citizenship. Some knowledge of these should form a part of the education of every citizen, and a familiar acquaintance with them will create in the minds of all a higher sense of the dignity and usefulness of the legal profession, and a better appreciation of the value of upholding a system of jurisprudence, the maintenance of which is essential to the progress if not to the preservation of society. W. P. F.

January, 1896.

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ELEMENTARY LAW.

CHAPTER I.

LAWS IN GENERAL.

§ 1. **Necessity for law.**—Laws, in their most general signification, are the necessary relations of things. In this sense all beings have their laws, the Deity has his laws, the material world has its laws, the beasts have their laws, man has his laws. Or as Plutarch expresses it, law is queen of gods and men. Human laws are the conditions under which men, naturally independent, unite themselves in society. The suspension of law in the material universe would result in chaos; to suspend the operations of law in society would result in anarchy. The ancient Persians, to impress upon the people the necessity for laws, suspended all laws for a period of five days after the death of a sovereign. Of all men the lawyer should be foremost in maintaining respect for existing laws.

§ 2. **Human laws.**—We have to deal here alone with the laws which men impose upon themselves. Discarding old theories, such as the divine right of kings, civilized peoples recognize the fact that sovereignty, ultimately and of right, rests in the governed. Each individual in society sacrifices part of his lib-

erty to save the rest, and the sum of these sacrifices constitutes the sovereignty of the nation, whether the depository be king or representative.

§ 3. **Laws in the United States.**—In the United States the sovereignty is lodged in different depositories, and the limit to the powers of each is to be determined by reference to the constitutions of the nation and the states. By these instruments the sovereign people have delegated certain portions of the sovereignty to their agents, the legislature, the judiciary and the executive. Within the limits prescribed by these constitutions, the agents of the people exercise their functions; beyond those limits they have no power. In England the sovereignty of the people is lodged in fact in Parliament, which is said to be, in the matter of making and executing laws, omnipotent. The English courts have a duty to perform in interpreting statutes, but they have no power, as the courts of the United States have, to declare an act of the legislature inoperative and void because it infracts some clause of the constitution. This power of our courts startles some foreign jurists, who regard it as a dangerous anomaly in government. Experience has taught us that the security of person and property, and the permanence of our institutions, rest largely on this power.

§ 4. **Laws and morals.**—We have been speaking of what is termed *municipal law*, which Blackstone has defined to be a rule of civil conduct prescribed by the supreme power of the state, commanding what is right and prohibiting what is wrong. Those things which we possess and enjoy under the protection of the law are our rights. Wrongs are those

things which are done in violation of the rules of civil conduct prescribed by the supreme power of the state. Of moral right and obligation, of moral duty and moral wrong, this is not the place to speak. Municipal law deals with acts, morality deals with motives. Courts of law are not always courts of conscience. As Professor Amos says: "A man may be a bad husband, a bad father, a bad guardian, without violating a law. He may be an extortionate landlord, a wasteful tenant, a hard dealer, an unreliable tradesman, and law can not touch him. He may be a rascally politician, a demagogue and indolent aristocrat, and yet satisfy to the utmost the claims of the law." So law, as we use the term in this treatise, is "a body of commands addressed to individual members of the human race forming the component elements of a state."

§ 5. A right resting upon municipal or civil law can be enforced or vindicated by a court, and such a right implies a perfect obligation to do or forbear. A right resting upon moral or social laws may be valuable and its transgression may cause pain, suffering and discomfort, but it can not be enforced or vindicated by a court or by any positive sanction. It is the province of courts and lawyers to deal with rights of perfect obligation alone.

§ 6. **Municipal Law.**—The law, and herein we speak only of municipal law, prescribes certain rules of civil conduct. These rules are (1) for the protection of our persons, (2) for the protection of our property, (3) for the protection of our reputation. The value of these rules consists in the fact that they emanate from and are enforced by the whole people,

acting through their legislatures, their courts and their executive officers. The entire physical power of a nation is pledged to their enforcement.

§ 7. **The Law-making Power.** — These rules of civil conduct are prescribed by the supreme power of the state. This supreme power is exercised in a despotism by a single ruler, such as the Czar. In a constitutional monarchy such as England, Germany and Italy, this power is lodged in the ruling sovereign and the legislature. In a republic, such as the United States, this power is subdivided. The supreme power of legislation is lodged in the legislative body and the executive, who may approve or veto a bill passed by the legislature. The supreme power of declaring what a legislative enactment means, in other words the power of interpretation, is lodged in the supreme court. The supreme power of enforcing the law rests with the executive. The value and permanence of our institutions depend upon the preservation to each of the departments— the legislative, the executive and the judiciary—its separate and appropriate functions.

§ 8. Good citizenship requires implicit obedience to the laws enacted by the legislature within the scope of its constitutional power, to the orders and decrees of the judiciary in all matters of which they have jurisdiction, to the commands of the executive in preserving the peace and enforcing the laws.

§ 9. **The Supreme Court of the United States.**— Professor Maine says the Supreme Court of the United States is the unique and important contribution of America to the science of government. He speaks, of course, of its transcendent power to annul an act

of the legislature approved by the executive, when, in the opinion of the court, the act in question is contrary to the provisions of the constitution. This power was disputed soon after the adoption of the constitution. It has never been denied since Chief Justice Marshall uttered those memorable words in his opinion in the case of Marbury *v.* Madison, 1 Cranch 177. He says: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other the court must decide on the operation of each. So, if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the consitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes to the constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the theory of our government, is entirely void is yet, in practice, completely obligatory. It would declare

that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is, in reality, effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure."

§ 10. **Kinds of laws in the United States.**—As in Rome, as in England, and the United States, law is divided into written and unwritten. Justinian, speaking of Roman law, says: "Our law is written and unwritten, just as among the Greeks some of their laws were written and others not written. The written part consists of laws *plebiscita, senatus-consulta*, enactments of emperors, edicts of magistrates, and answers of jurisprudents." Blackstone says: "The municipal law of England or the rule of civil conduct prescribed to the inhabitants of this kingdom may with sufficient propriety be divided into two kinds: The *lex non scripta*, the unwritten or common law, and the *lex scripta*, the written or statute law."

§ 11. Owing to the peculiar form of our government, our written laws are of different dignity and authority. Our national constitution declares that "the constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary

notwithstanding." Next in dignity and authority are the written constitutions of the several states and the acts of the legislatures of the states respectively; to these may be added the ordinances of cities and towns. These constitutions, treaties, acts of congress and acts of the legislature, and ordinances, constitute the written laws which govern the people of the United States. These written laws emanate from the sovereign will of the people and are self-imposed.

§ 12. The unwritten law in the United States may be defined in the words of Justinian as being "that which usage has established; for ancient customs, being sanctioned by those who adopt them, are like laws." It is customary law, and is as obligatory as any other law. In a pending controversy the courts announce the rule of civil conduct, *i. e.*, the law which fixes the rights and liabilities of the parties before it, whether that rule is found in the written or the unwritten law. This unwritten or common law is different in different states. The United States as a nation has no common or unwritten law. The national or federal courts administer the common law as they find it to exist in the states respectively. The common law of Louisiana, for instance, is based upon the principles of the civil law which came to Louisiana from France. The common law of most of the other states finds its source in the common law as it was established and administered in England and her colonies at the time of the separation.

CHAPTER II.

INTERNATIONAL LAW AND CITIZENSHIP.

§ 13. **International law.**—This is composed of the rules which fix the rights and duties of civilized nations in their intercourse with one another. Professor Maine defines it as the law of negotiation and diplomacy. The horrors of war on land and sea made international law a necessity. There are, however, no fixed sanctions or penalties to punish violations or to enforce obedience to this law; there is no tribunal to hear and determine questions touching breaches of the law. If two nations have a controversy, it can be settled in one of three ways. *First*, by negotiation between the parties concerned. *Second*, by arbitration agreed upon by the parties. *Third*, by war. The Amphyctionic Council was established for a law of nations for the Greek states, but it failed. Aristotle pleaded for the humane treatment of prisoners of war. As late as the Middle Ages the usages of war were barbarous. The church exercised her influence to soften its rigors. Her efforts were supplemented by the laws of chivalry, and later, nations by treaties bound themselves to certain rules for the conduct of war, and these rules by constant usage have come to be settled law among all civilized peoples. The scope of international law includes also the customs and usages which fix the rights of neu-

trals, the navigation of the high seas, the extent of the jurisdiction of nations over the seas at their coast lines, the punishment of piracy, treatment of ambassadors and consuls, passports, in fact of all matters growing out of and related to the intercourse of the subjects of nations with each other.

§ 14. What is called the conventional law of nations is composed of those stipulations and rules which have been incorporated in treaties, a law which is only binding upon the parties to the treaty. To promote harmony and to facilitate the settlement of controversies between nations, and the subjects of different nations, it is customary for nations to have accredited representatives at the seat of government of other nations. These representatives, whether called ministers or ambassadors, are not subject to the jurisdiction of the courts of the country to which they are sent, and the same rule extends to the members of their families and households.

§ 15. **Neutrality.**—When two nations are at war, other nations should observe the duties of neutrality towards the belligerents. To enforce these duties most nations enact neutrality laws for the purpose of punishing such of their subjects as violate their duties. A neutral must abstain from giving aid to the belligerents.

§ 16. **When war exists.**—Each belligerent has the right to seize and possess itself of all property within its borders belonging to the enemy or the enemy's subjects. Exceptions are made in favor of debts owing to foreign creditors and to ships in port which have not had sufficient time to leave after hostilities began. Where and to what extent the

property of an enemy may be seized and confiscated is in this country a political question which must be determined by congress.

§ 17. **Interstate law.**—Akin to international law is what may be called interstate law in this country. In a large measure the rights of citizens of one state to travel in, to carry on business, to make contracts, and to acquire and enjoy property in the other states are secured by the constitution of the United States; but in many things their rights are restricted by state laws. Corporations organized under the laws of one state doing business in another, must submit to and perform such conditions as may be imposed upon them by the latter state. So, contracts made in one state will be enforced in another state only according to the methods of procedure of the latter state. As when the laws of the state in which a suit is brought to collect a debt contracted in another has a statute of limitations which bars a recovery sooner than it would be barred in the state where the contract was made, the shorter limit will be applied.

§ 18. While the federal courts take judicial notice of the laws of the United States, and of all the laws of all the states, the state courts only take judicial notice of the laws of the United States and of their own states. Ordinarily, the laws of one state are limited in their operations to the geographical boundaries of the state. When, however, a contract is made in one state, the law of that state must be resorted to in measuring the rights of the parties to it. The law of the place where the contract is made determines their rights, and the law of the place

where redress is sought in the courts determines the manner of the remedy.

§ 19. Where a man having a domicil in one state dies intestate, leaving property in two or more states, it is a rule of law that the personal property shall be distributed amongst his heirs according to the law of the place of his domicil, and that the real estate shall descend to his heirs according to the laws of the place where it lies.

§ 20. **Citizenship.**—Citizenship is the state of being vested with the rights and privileges of a citizen. In this country there are two kinds of citizenship and allegiance—one national and the other state. It is for congress to determine who shall enjoy the privileges of national citizenship within the limits prescribed by the constitution, and the laws of the several states fix the conditions under which state citizenship is acquired. No state can make or enforce a law which shall abridge the privileges and immunities of citizens of the United States; nor can any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws. This is a provision of the constitution of the United States—and any state law to the contrary is void. It is further provided in the constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. The right of a citizen to expatriate himself and become a subject of another nation was questioned in this country until congress passed a law recognizing such right.

§ 21. Citizenship is acquired by birth or by natural-

ization. Congress has sole power to establish uniform rules of naturalization. It is in the power of the states to adopt citizens on easier terms than the laws of congress may impose, but they have no power to exclude from citizenship those who have been naturalized according to the laws of congress. By these laws the applicant must make oath before the proper officer, at least two years before his admission, that it is his intention to become a citizen, and renounce his allegiance to his own sovereign. At his final admission to citizenship he shall make oath that he will support the constitution of the United States and renounce all allegiance to any foreign power, especially his own sovereign. He must prove by at least two citizens that he has resided in the United States five years and within the state or territory where he is located, one year; that he has been a moral person and is attached to and well disposed toward the principles of this government. He must also renounce all titles to nobility, if he have any. A minor alien (not a Chinese), who shall have resided within the United States three years next preceding his majority, and so resides at the time of making his application, may, after reaching his majority, and having resided in the United States five years, including the three years during his minority, be given citizenship without a preliminary declaration. An alien who is over twenty-one years of age, who has enlisted and served in the armies of the United States as a regular or volunteer, and has been honorably discharged, can, if he has resided in the United States one year, be admitted to citizenship without a preliminary declaration. Children of naturalized

parents, who were under age when the parents were naturalized, shall, if residing in the United States, be considered citizens. By the laws of some states aliens who have declared their intention to become citizens of the United States and have resided in the United States one year are allowed to vote in the state where they reside.

§ 22. **Aliens.**—The rights of aliens to acquire and hold property by purchase or descent are fixed and regulated by the laws of the several states, and in most, if not all of them, aliens may take and hold property by devise, descent, or purchase in the same manner as citizens. In some states this right is limited to such right as citizens of the United States may have to take and hold property within the country of such aliens.

CHAPTER III.

WRITTEN LAWS.

§ 23. **Constitutions.**—We come now to inquire as to the manner in which the supreme power of the state prescribes the rules of civil conduct, as they are embodied in the written law. The constitution of the nation, or of the state, is the direct and imperative expression of the will of the people. Legislatures and courts are under the constitution, and are created by it or by its authority. This paramount written law, the constitution of the United States, can only be amended by a vote of three-fourths of all the states of the Union. The constitutions of the several states may be amended in such manner as is provided in the constitutions themselves.

§ 24. **Statutes.**—The powers of congress are fixed by the constitution, as it is interpreted by the supreme court. If the power to legislate on a subject is conceded to congress, the supreme court will not inquire into the policy of a law, or the motives, which led to its enactment, or the manner in which it was enacted. It is only when the law violates a provision of the constitution that the court by its judgment pronounces it null and void. Courts of justice should bring every law to the test of the con-

stitution, first of the United States and then of their own state, as the paramount and supreme law, to which every inferior power must conform. As the laws enacted by congress and by the state legislature must be brought to the test of the constitution, so the ordinances of towns and cities, which are the creatures of legislative power, must be brought to the test of the laws or charters by virtue of which they exist. Laws enacted by congress are in force from and after their passage, unless the time of the taking effect of the law is postponed to a later date by the law itself. It would be manifestly unjust to enact laws without providing some means of publishing them, so in civilized nations legislative enactments which have the force of laws are published by authority. In some states of the Union, general laws are not in force until they are printed and distributed to every county in the state. In Indiana if in the body of the act it is declared that an emergency exists for the immediate taking effect of a law, it is in force from and after its passage.

§ 25. **Validity of statutes.**—It is a rule of decision which the courts recognize, that whenever the constitutionality of a statute is doubtful, it will be sustained. No statute by any fiction or relation shall have any effect before it be actually passed. And a statute is not passed so as to have effect until the legislature has given the required number of votes in its favor. When the fact of its receiving this many votes is certified to the governor or president, by the presiding officers of the two houses, and the executive signature and approval are affixed thereto, it is a law and not before, unless in exceptional cases

where the legislature may re-enact a law by passing it over the veto of the governor or president, as provided in the constitution.

§ 26. **Retroactive statutes.**—It is a maxim that a legislative enactment ought to be prospective and not retroactive. A retroactive statute would partake in its character of the mischief of an *ex post facto* law, as to all cases of crimes and penalties; and in cases relating to contracts or property it would militate against every sound principle. A retrospective statute affecting and changing vested rights is generally considered as grounded on unconstitutional principles, and consequently is void. But this doctrine does not apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts or disturb vested rights, and only tend to confirm rights already existing, by curing defects and aiding in enforcing existing obligations. Such statutes are held valid when clearly just and reasonable, and conducive to the general welfare, even though operating in a degree upon existing rights; as a statute to confirm marriages defectively celebrated or a sale of lands defectively made or acknowledged.

§ 27. **Public and private statutes.**—Statutes may be public or private. Public statutes relate to the country or state at large and private statutes concern the particular interests of certain individuals. Public statutes bind everybody, private statutes do not bind strangers in interest by their provisions. Courts take judicial notice of public statutes, but not of private statutes. A party to a suit basing a claim upon a private statute must plead it specially, but one who

bases his claim upon a public statute need not plead it at all.

§ 28. **Interpretation of statutes.**—After a law is enacted in due form and its constitutionality is established or conceded, questions may arise as to the meaning of the law. Here the duty of interpreting the law is devolved upon the courts, whenever in an action before them the parties to the action insist upon different interpretations. Interpretation is the art of finding out the true sense of any form of words, that is, the sense which their author intended. And here let us note some of the rules of interpretation. It is not permitted to interpret what needs no interpretation. Where the intention of the law-making power is plainly manifest from a reading of the statute, that intention must prevail over the literal sense of the terms used. The intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute compared together, just as a contract or a will is interpreted and the meaning of the parties ascertained by considering every part of the instrument under consideration. Where the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view; and the intention is to be taken according to what is consonant to reason. The words of a statute, if of common use, are to be taken in their plain, obvious and ordinary sense. If technical words are used they are to be taken in a technical sense, unless it clearly appears from the context or other parts of the law that the words were intended

to be applied in a different sense. If the technical meaning of terms is in doubt or disputed, the court may call to its aid those whose calling has made them acquainted or familiar with the meaning of such words. Statutes should be interpreted according to the natural and obvious import of the language without resorting to subtle or forced constructions. All the statutes of the same legislature relating to the same subject are to be taken together, for they are considered as having one object in view, and as acting on one system. So, whenever it is clear that a power is given by the statute, the court will construe it as implying the right to make it effective. It is a rule in some, but not all of the states, that statutes enacted in derogation of the common law are to be strictly construed. Remedial statutes are to be liberally construed; while penal statutes are to be strictly construed. Beccaria says: "Penal laws should be so plain that no judge should be tempted to interpret them. There is nothing more dangerous than the axiom, *the spirit of the law is to be considered.*" If the sovereignty, the legislative power has not spoken plainly, there is no law.

§ 29. It is better thus than to allow judicial legislation concerning the lives and liberties of the subject. The disorders that may arise from a rigorous observance of the letter of the penal laws are not to be compared with those produced by the interpretation of them. Statutes against frauds are liberally construed, and the reason is that they deprive no man of his right. They inflict no punishment, they simply prevent a wrong-doer from taking or keeping what he seeks or holds by fraud. The common law gives

place to a statute, and an old statute gives place to a new one.

§ 30. Where the provisions of a new statute are repugnant to the provisions of an earlier statute, the earlier is said to be repealed by implication, the later statute being the more recent expression of legislative intention. Repeals by implication are not favored. Statutes limiting the powers of future legislatures are void. A legislature can not enact an irrepealable statute unless it is in the form of a contract—such as a charter, under which rights have become vested. Ordinarily the repeal of a repealing statute revives the statute which had been repealed. Some states have by law abolished this rule.

§ 31. Where a literal construction would violate the legislative intention, it will not be adhered to. A saving clause or *proviso* repugnant to the body of the statute is void. Where a statute contains a word whose meaning is known to the common law, that meaning will be adopted. In construing a doubtful statute, the preamble and title may be consulted. Long-continued practice may affect the construction of a statute, and the contemporaneous construction of a statute is of high authority.

CHAPTER IV.

UNWRITTEN LAWS.

§ 32. **Common law.**—We have now to speak of the unwritten or common law. The phrase common law is here used in contradistinction to statute law and law as contained in written constitutions, although it may also be appropriately used in contradistinction to the civil or canon law, admiralty and maritime jurisprudence, and very often to equity. In the sense here used it is an unwritten law, which receives its binding force from immemorial usage and universal reception in distinction from written or statute law. Its rules or principles are to be found in the text-books written by men learned in the law, in the records of the courts and in the reports of judicial decisions. As a rule of civil conduct it is of binding obligation upon all until it is modified or overruled by statute law.

§ 33. **Sources of the common law.**—The origin or source of the common law has been said to be undiscoverable. It is the sum of innumerable accretions from ancient customs and usages which began among the people of England, which customs are sometimes designated as the "ancient Saxon privileges," or the body of laws framed by Alfred the Great and re-affirmed by Edward the Confessor. In

making this compilation, Alfred drew upon the Mercian laws existing in the counties bordering on Wales and retaining old British customs; upon the West Saxon of southern and southwestern counties of England; and upon the Danish of the western coast, where a Danish settlement had been effected. Some affirm, with apparent good reason, that it was framed in part from the Old Testament; portions of it were undoubtedly taken from the principles of the Roman Pandects. These were compiled by Roman lawyers by command of Justinian from the writings and opinions of the old Roman jurists and formed a part of the body of the civil law of Rome, which has been accepted as the basis of mediæval legislation and of nearly all European law. The spirit of these laws found its way into England through the clergy, who were the only learned class of that period. Some centuries later the laws themselves became embodied in the common law of England in a more positive and extensive form.

§ 34. **Growth of the common law.**—At the time of the Norman conquest the invaders found the English people living under a code of laws which was compiled by Edward the Confessor, upon the basis of the code of Alfred, which has already been mentioned. The renewal by *Magna Charta* of the "ancient Saxon privileges" was the re-enactment of a part of the code of Edward. Although the common law is an unwritten law, its rules and principles have been handed down from generation to generation, and sometimes have almost approached in exactitude the complete and precise form of statute law. An illustration of the adaptability of the com-

mon law to the wants of society is found in the manner in which the rules of the law merchant were incorporated into or were assimilated by the common law. During the operation of the feudal system the rules of the common law were inadequate to the needs of the mercantile classes. As controversies came before the courts, they were in the habit of applying to commercial contracts the rules which had been adopted among merchants in their business dealings, just as courts now interpret and enforce the contracts of men engaged in the various callings of life, according to the customs and usages prevailing in such callings. So numerous were the rules of the law merchant, and so important had the mercantile classes become, that by a statute enacted during the reign of James I these rules were declared to be a part of the common law. And substantially as they were when this statute was enacted, they have come to be a part of the common law of the United States.

§ 35. **Functions of the courts.**—The unwritten or common law constitutes the great bulk of the English and American system of law. Of this system the lawyers and judges are the visible artificers. "The state has," as Prof. Holland says, "in general two and only two articulate organs for law-making purposes—the legislature and the tribunals. The first organ makes new law; the second attests and confirms old law, though under cover of doing so it introduces many new principles." It is the function of the legislature to innovate, for it is the desire or object of the legislator to do away with something old or establish what is new. On the

other hand it is the province of the tribunal not to innovate, but to declare and confirm what already is assumed to exist. And while courts may and many courts do seek to make new rules, in so doing they enter upon the dangerous ground of judicial legislation. Judge-made law, or law made by one man, is, in this country at least, an abomination. It is a usurpation by one branch of the government upon the powers of another. It is the foulest injustice to remove landmarks, and to corrupt the law is to poison the very fountains of justice. Judicial laws are always retrospective and are worse than retrospective statutes. Against retrospective statutes there is the bar of constitutional provisions. There is no such bar against the capricious legislation of a judge. A judicial superseding of legislative intent is an act of mere executive insubordination. It is dangerous and may easily become the source of the gravest abuse.

§ 36. **Common law in the United States.**—The common law of the states comprising the United States consists of the common law of England as modified by English statutes previous to the colonization of America, so far as it was adapted to the altered conditions and circumstances of the colonies, and those English statutes passed afterwards prior to the American Revolution, which were practically accepted and adopted in America and became a part of the common law. The common law is presumed to exist in the colonial states and in states of which the population was made up from those states, in fact all the states except Louisiana have in one form or another adopted the common law. The

United States as a nation has no law that is not embodied in the constitution, treaties or laws enacted by congress, and the common law could be made a part of our federal system only by legislative adoption.

§ 37. **Precedents, importance of.**—What is common law is declared by the courts, and what the courts have declared to be the law is found in their records and published decisions. When a rule of law has once been declared it ought not to be disturbed unless by a court of appeal or review, and never by the same court, unless upon very urgent reasons and upon a clear manifestation of error; any other practice leaves the citizen in a perplexing uncertainty as to the law. A precedent, even where it appears to be flatly unreasonable and unjust, may and should be followed if it has been acquiesced in for a long period, or if it has become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by overruling it. In such a case the better course is to leave the correction of the error with the legislature which can so shape its action as to make it prospective only, and thus prevent the injurious consequences that must follow from judicially declaring the previous decision unfounded.

§ 38. **Customs.**—Customs form a large part of the common law, and these customs are general or particular. It is a matter of historical observation that long before any supreme political authority has come into being a series of practical rules determine the main relations of family life, the conditions of ownership, the punishment of the more violent forms

of moral wrong-doing, and the adjustment of contracts. The mode in which such rules are formulated seems to be the following: A spontaneous practice is first followed, and if good and useful, is generally copied over and over again, the more so as habit and association always render the imitation of an old and familiar practice easier than inventing a new and untried one. It is the peculiarity of the class of customs which are the true germs of future law that they are being constantly brought to mind and tested by application to actions. Customs prescribing the formalities and conditions of marriage are brought into distinct consciousness on the formation of every fresh family. The incessantly active vicissitudes of birth and death in every community call for an unintermittent series of decisions upon the competing claims of survivors in matters of ownership, and upon the responsibilities of those who may already be called "personal representatives" in matters of contract. The main machinery for the conversion of desultory and uncertain customs into fixed rules are the decisions which are constantly demanded for the purpose of ascertaining the nature and extent of an alleged custom. These decisions may be made by a casually selected arbitrator, a village council, or any man or body of men agreed upon, or who may have authority to hear the matter. The grounds of decision may be the personal mercy of the judge, or expediency, or analogy. Such decisions become precedents and by them the uncertain custom becomes fixed and solidified as a rule of civil conduct, or law.

§ 39. A custom is defined as being such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matter to which it relates. A particular custom is distinguished from a rule of the common law in this, that the latter is universal, while the former is particular to this or that place. It is distinguished from usage in this, that custom is the rule of which usage is the legal evidence. The difference between prescription and custom is that while prescription is the making of a right, custom is the making of a law. General customs are such as constitute a part of the common law, of the country, and extend to the whole country; particular customs are those which are confined to a particular district; or to the members of a particular class; the existence of the former is to be determined by the court, of the latter by the jury. Customs are said to be good in law: (a) where they have existed time out of mind; (b) have been uninterrupted; (c) have been peaceably enjoyed or acquiesced in; (d) are reasonable; (e) are certain; (f) are compulsory; (g) are consistent with one another. Local usages or customs, applying to particular callings, will be enforced between parties who have dealt with reference to them. Usages, which are plainly repugnant to well known rules of law, are not recognized and can not be proven. Customs of trade are proven to show the intention of parties in making contracts. But customs of trade can not be enforced against a stranger who is ignorant of them. For instance, a merchant can not charge a customer interest on a running account because it is his custom, unless the customer knows it. Nor will

a custom be allowed to control the interpretation of a written instrument in opposition to its express terms, and courts are always averse to holding customs good where they vary the common law obligations of the parties.

CHAPTER V.

RIGHTS.

§ 40. **Legal rights.**—The object of law is to protect us in the enjoyment of our rights and to punish invasions of these rights. A right in one person implies a duty in all other persons to respect that right.

Absolute rights belong to individuals in a single, unconnected state. *Relative rights* are those which arise from the civil and domestic relations.

We speak also of natural rights, by which we mean (a) right to life; (b) right to liberty; (c) right to form the family relation; (d) right to acquire property; (e) right to make contracts. Moral claims, often called rights, can not be enforced by law: as obedience to parents, politeness to equals and inferiors, the duty of charity, and the like. These can only be enforced by public opinion and the individual conscience. A disregard of them is punished by the opprobrium which public opinion casts upon the offender. We have here to do with legal rights, or those to which the state has given its sanction; they are such rights as can be enforced by legal means against the persons or the community whose duty it is to respect them. These rights may be enforced in actions at law or equity by the courts, or by the public prosecution of offenders against them,

in which the sanction may be penal or compensatory, or both.

§ 41. **Meaning of natural rights.** — Blackstone says the absolute rights of man may be summed up in one general appellation and denominated the natural liberty of mankind, whereupon Judge Cooley remarks that there is no such thing as natural liberty. He says: "Every man enters into society by being born into it, and he gives up no natural liberty but acquires liberty by becoming a member of the civil state. This liberty is civil liberty and it constitutes the sum of a man's civil rights as they are declared and protected by law." So that man's liberty and rights are determined by the law, written and unwritten, of the society or state of which he is a member. The rights thus given by law are enforced in suits in the courts, brought by or in behalf of individuals whose rights are invaded. As to the forms of procedure in enforcing these rights more will be said hereafter.

§ 42. **The right of personal security.**—The right of personal security is the most important of all rights and it consists in a person's legal and uninterrupted enjoyment, (a) of the right to life, (b) of the right to limbs, body, etc., including the right to use them in lawful labor, (c) right to the preservation of health, (d) the right to one's reputation, (e) the right of free speech and locomotion. These rights are only determined by death.

§ 43. **The right to life.**—The right to life begins with the first pulsations in the unborn child. It is everywhere a moral wrong, and in most civilized countries it is a crime to destroy human life, even in its

first manifestations. The right to life implies the right to preserve it, and from this springs the right of self-defense, a right which is not given by law but is recognized by it. It is a right which exists in the jungle when one is set upon by a wild beast, and it is the same right when asserted in the most civilized society where life is threatened by an assassin. Besides the right of the individual to repel a deadly assault by taking the life of his assailant, society has the right to punish with death any one who unlawfully takes the life of another. Blackstone and the earlier writers base the right of capital punishment upon the Mosaic law, but the better view now is that it rests upon grounds of public policy and can only be justified when and because it is necessary for the preservation and security of society.

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§ 44. **The right of personal liberty.**—The right of personal liberty is secured by that provision of the constitution which declares that "No person * * shall be deprived of life, liberty or property without due process of law." "The meaning of this is," as Webster said in his speech in the Dartmouth College case, "that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society." This term liberty is, as has been said, a negative term denoting the absence of restraint. But it is more—it implies the right to think, to speak, to act individually or with others, to labor for one's support without molestation from others; it means the right to the full exercise of one's faculties in lawful ways. Civil liberty, which is here meant, is liberty restrained so far as is necessary for the common good.

§ 45. **Habeas corpus.**—To prevent unlawful invasions of this right to liberty the *habeas corpus* act of the year 1679 has been re-enacted generally in the American states. And to further secure it the constitution of the United States declares that "The privilege of the writ of *habeas corpus* shall not be suspended, unless where, in case of rebellion or invasion, the public safety may require it." The law also gives one who is unlawfully restrained of his liberty a civil action against the wrong-doer.

§ 46. **Right to health.**—The right to the preservation and enjoyment of health is protected and enforced by suitable laws. No one has the right to do anything which will impair the health of another. To create or maintain a nuisance by carrying on a noisome trade in a thickly populated neighborhood, to the discomfort of, or to the injury of the health of, the citizens, would, where the wrong was sufficient to amount to a public nuisance, be punished by the criminal law, and if the injury is confined to one or only a few of the citizens, they have a right of action in which damages for the injury may be recovered from one who creates or maintains the nuisance, and in a proper case the courts will interfere by injunction and prohibit its continuance.

§ 47. **Right to reputation.**—The right to one's reputation is protected and enforced by the laws on the subject of libel and slander and malicious prosecution. To write and publish anything of another which is false, and which either charges a crime or holds one up to public scorn or ridicule, is libelous, and subjects the author to an action for damages, and in many states to a criminal prosecution also. To

falsely say of a man that he has been guilty of a crime which would subject him to infamous punishment, or to say falsely of a woman that she is unchaste, is slander and the injured party may recover damages of the offender in a civil action. To charge a man falsely before a magistrate with the commission of a crime with malice and without probable cause, is malicious prosecution for which in a proper case damages will be awarded to the injured party.

§ 48. **Right to property.**—The right of property is secured by the fifth amendment to the constitution of the United States which provides that: "No person shall be deprived of life, liberty or *property* without due process of law," and by the fourteenth amendment, which provides that: "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or *property* without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

§ 49. The right of property is the right of dominion, ownership, possession. Law writers have different theories of the origin of this right. Blackstone says, "The earth and all things therein were the general property of mankind from the immediate gift of the Creator. * * By the law of nature and reason, he who first began to use it (property) acquired therein a kind of transient property that lasted as long as he was using it and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common and no part was the perma-

nent property of any man in particular; yet whoever was in the occupation of any determined spot of it for rest, or shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature to have driven him by force, but the instant that he quitted the use or occupancy of it, another might seize it without injustice."

CHAPTER VI.

PROPERTY IN GENERAL.

§ 50. **Basis of ownership.** — In speaking of the Roman laws the German jurist Savigny says that "all property is founded on adverse possession ripened by prescription." Sir Henry Maine gives it as his opinion that the "true basis of the right of property is not an instinctive bias towards the institution of property, but a presumption arising out of the long continuance of that institution that *everything ought to have an owner*. Where possession is taken of an object which is not or has never been reduced to dominion, the possessor is permitted to become proprietor from a feeling that all valuable things are naturally the subjects of exclusive enjoyment, and that in the given case there is no one to invest with the right of property except the occupant. The occupant, in short, becomes the owner, because all things are presumed to be somebody's property and because no one can be pointed out as having a better right than he to the proprietorship of this particular thing." The individual right of property, as appears from a closer study of ancient law, seems to be a comparatively modern conception. Ancient law knows next to nothing of individuals; it is concerned not with individuals, but with families; not with single human beings, but groups. It is more

likely that joint ownership and not separate ownership prevailed in primitive societies.

§ 51. **Origin of private ownership.**—Out of this community ownership, in which the rights of all the individuals were blended, there grew the idea of private property. So long as the family or tribe or community held property in common the right of individual or private ownership was practically ignored, if, indeed, it existed at all. This right grew and strengthened as the family, tribe or community disintegrated under the ameliorating influences of advancing civilization, and as the individual escaped from the tyranny of the head of the family or the chief of the tribe.

§ 52. **Its importance.**—The power or assertion of exclusive ownership is manifested by boundaries, fences, walls encircling land, and the actual possession and control of personal property. This dominion of the individual over his property is permitted and defended by the state as a pure matter of convention and policy. In a savage state it is not essential, except as to things of little value, but in a civilized society it is the basis of property, and without it progress would seem to be impossible. Land being indestructible in character, limited in extent and incapable of increase, can not be regarded as a true subject of permanent individual appropriation. And however important it is that the tenure of the cultivation of the soil should be secure, the paramount dominion of the state over every part of its territory is a fact which in a high condition of social progress can not be emphasized too strongly or made to be felt too universally and really. By enactments pro-

hibiting the entailment of estates in land by abolishing primogeniture, by succession taxes, and other devices in case of need, the states of the Union have it in their power to prevent the hurtful monopolization of land.

To protect this right of property, whatever may be its origin or extent, the law has provided numerous methods to prevent the invasion of the right, and to redress wrongs by which it is violated. The laws for redressing injuries to the rights to life and personal security are comparatively few—the laws for the protection of the right of property are, as we shall see, numerous.

§ 53. **Kinds of property.**—There are three kinds of property which are the subject of individual ownership, real, personal and mixed, and these are subdivided into corporeal and incorporeal. There can be no individual or exclusive ownership of any object which can not be exclusively possessed or enjoyed; so that the elements of light, air and water, which a man may occupy and use by means of his windows, his gardens, his walls and other conveniences are his so long as they remain in his possession, but if he ceases to possess them or voluntarily abandons them, they return to the common stock, and the next taker has an equal right to seize and enjoy them. This principle applies to animals *feræ naturæ*, surface and subterranean streams of water, and veins or reservoirs of oil or gas beneath the soil. The doctrine of ancient lights which once prevailed in England, that is, the right that the first builder upon ground had to prevent the owner of the adjoining ground from erecting a structure that would shut out the light or air from the first builder's house, has been

abandoned in this country. The owner of the soil has the right, in the absence of boundary agreements to the contrary, to dig as deep and to build as high as he sees fit, so long as he conforms to the lines of his own boundaries, and does not undermine or injure the land or buildings of his neighbor.

Real property consists of land and structures permanently affixed to land.

Personal property consists of such things as are movable and may attend the person of the owner wherever he may go, as goods, money, jewels, chattels and the like.

Mixed property is that kind which is not altogether real nor personal, but partakes of the nature of both, such as heirlooms, pews in a church; and title deeds to an estate have been held to be mixed property.

Corporeal property consists of such material things as may be apprehended by the senses, as lands, goods, animals, and may be the subject of actual manual possession and capable of being transferred by delivery.

Incorporeal property is that which consists in legal right merely, as choses in action, rights of way, easements and the like. It is a legal right which one man has, not to the property of another, but in it; as in the case of a right of way, the land is owned and in possession of one as corporeal property, while another has the single right of passing over it, which is incorporeal property. Both are valuable property rights and the owners of them respectively will be protected in their enjoyment by the courts. Incorporeal property may be acquired by agreement, or it may be

created by operation of law, as when one sells a parcel of land in the center of his own field, the buyer by operation of law acquires a right of way over the seller's other land which surrounds his.

CHAPTER VII.

REAL PROPERTY.

§ 54. **Real property.**—The law of real property, as it exists to-day in the United States, is full of intricacy. The commercial spirit of modern times has broken down many of the artificial barriers which the feudal system and the English laws of descent and tenures interposed to prevent the quick and easy transfer of landed estates. But enough of the old rules survive to confuse and perplex the student, and to tax the experienced lawyer, when he is called upon to decide concerning the rights of claimants to land. It is only intended here to give in outline some historical facts and general rules showing how and from what source titles to land are derived, and how they are transferred from one person to another.

§ 55. **Titles in the United States.**—It is a fundamental principle in the English law that the sovereign was the original proprietor of all the land in the kingdom. The same principle holds good in the United States as to all lands which are known as public lands. By the terms of their charters, the original colonies which became states reserved the right when the Union was formed to hold and dispose of the lands within the boundaries of their respective grants independently of the nation. Virginia, by cession of parts of her territory to the United States, aban-

doned her original claim, reserving to herself, however, certain portions now in the states of Kentucky and Ohio, which she bestowed upon her soldiers who served in the Revolutionary War. Titles to lands lying within the territories acquired by purchase and annexation since the formation of the Union, such as Florida, Louisiana, Texas, California, New Mexico, Arizona, Colorado, are held and derived from two sources.

§ 56. **Land acquired by treaty.**—In acquiring these territories, so far as they were acquired by treaties and annexation, the United States agreed that titles held by grant from Spain, France, and Mexico should be respected and treated as valid. Lands not granted at the date of the treaties became part of the public lands, and titles to such lands are derived from the United States.

§ 57. **Indian titles.**—In the fifteenth and sixteenth centuries, when navigators from Europe made their discoveries upon the American continent, Spain, France, Holland and England tacitly agreed that discovery and occupancy gave title to the first comer, not only against other European nations, but against the native Indians. The absolute title of the Indians "yielded to the military, intellectual and moral power of the European immigrants." The Indians were allowed to occupy, but not to dispose of the land, except to the government within whose boundaries they lived. This rule grew out of the necessities of the case. To have allowed the Indian tribes to make transfers of land to other nations would have been a mischievous source of controversy and war. The policy of our government has been

to treat the Indians as wards. Whether our duty as guardian has been discharged with a due regard to the rights of our wards is a matter upon which opinions differ. Little by little, however, the Indian titles have been extinguished, and the Indians themselves have been confined to certain reservations, until now the lands they are permitted to occupy are a "mere patch" when compared to the immense domain which they used or possessed when the Europeans discovered the continent.

§ 58. **Injustice to Indians.**—The whole subject of the relations of our government to the Indians, and of the extent and nature of their title to the lands occupied by them, has been treated so thoroughly and exhaustively in the opinions of Chief-Justice Marshall and Mr. Justice McLean, in the case of Worcester *v.* The State of Georgia, 6 Peters, p. 515, that it is deemed better to refer the reader to that source of information, rather than to attempt to set forth here what at best would be but an imperfect statement of it. In closing his lecture upon this topic, Chancellor Kent says: "The federal government, since the period of our independence, has pursued a pacific, just and paternal policy toward the Indians within their broad territories. It has insisted on no other claim to Indian lands than the right of pre-emption on fair terms; and its plan of permanent annuities as an ingredient in the consideration of purchases has been attended with beneficial effect. Our government has labored to protect the Indians from wars with each other, from their own propensity to intemperance, and from the frauds and injustice of the whites, and to impart to

them some of the essential blessings of civilization. The Indians of the present day are a feeble and degraded remnant of a once proud, spirited, enterprising race, and are hastening to annihilation." The author of the book entitled, "A Century of Dishonor," who spent many years with the Indians in the western territories, makes the statement that our government has broken all the treaties it ever made with the western tribes, and that so far from pursuing "a pacific paternal policy," it has played the role of a very cruel step-father in its intercourse with them.

§ 59. **Definitions.**—Having considered the beginning or foundation of the titles to land in this country, we come now to speak of the interests which individuals may own in land. Things real consist of land, tenements and hereditaments. The term land comprehends any ground, soil or earth. It also includes all buildings erected upon it, though cases may arise where by agreement of parties, or by the nature of the structure and the intention with which it was placed upon the land, it may have and retain the character of personal property. Under the term land is included the water which covers the land, so that we do not speak of so many acres of water, but of so many acres of "land covered by water," which was the phrase used in pleading and conveyances, but now the term land will cover and include all water, whether of lake or stream, within its bounds. Tenement, in its original, proper and legal sense, signifies everything that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible or of an unsubstantial, ideal kind. But an hereditament,

says Sir Edward Coke, is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed. Hereditaments are of two kinds, corporeal or such as affect the senses, such as may be seen and handled by the body; incorporeal are not the objects of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

§ 60. **Lands bounded by streams.**—The grant of a stream of water by that name will not pass the land over which it runs, but the grant of a parcel of land passes the property in a stream of water which runs over it as much as it does the property in the stones at the bottom of the stream. One who owns land on both sides of a stream owns the whole bed of the stream. When a stream bounds the lands of two, each owns to the thread of the stream. The owner of land over which water flows has the right to use the water without diminution or obstruction, except so far as the reasonable use of the same by other riparian owners may affect it. Strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. No proprietor of land bounded by a water-course has a right to use the stream to the prejudice of another proprietor. He may not dam it so that it overflows the lands of those above him, except (1) where he gets their permission, or (2) where for certain public uses the statute authorizes him to do so upon compensating the owners for the injury. He may not foul the

stream by carrying on a noxious trade which poisons the water or makes it unfit for use.

Where land is described as bounded by a non-navigable lake, pond, or stream, the general rule is that the boundary is the center or thread. This rule does not hold where there is anything in the grant to indicate a different intention. Where land abuts on the sea or its estuaries, or upon rivers in which the tide ebbs and flows,—only these being navigable at common law,—the boundary is at high-water mark. In America there is some conflict as to what rule shall be applied to fresh water lakes and the large rivers, which are navigable in fact but not at common law. As to these the weight of authority places the boundary at low-water mark. Where a non-navigable stream gradually changes its course, the boundaries follow the change in the waters; but if the change be abrupt, the ownership remains according to the former bounds.

§ 61. A proprietor of an island in a water-course owns to the thread of each branch of the stream, which in its natural course divides it from the main land. And where a water-course is thus divided by an island, and the smaller portion descends on one side, the proprietor by whose land such smaller quantity flows is entitled to no more water than naturally runs between his bank and the island.

§ 62. **Islands.**—Where islands are formed in the sea or a navigable river, they belong to the sovereign; in rivers not navigable and above where the tide ebbs and flows, they belong to the owners of the adjoining land. If there be an island exactly in the middle of the stream, it is equally divided between the two proprietors. But if one portion approaches

nearer to one side of a stream than it does to the other, the greater part belongs to the owner of the nearer estate, according to its approximation thereto. When a river is the boundary line between two nations or states, if the original property be in neither and there be no agreement about it, each holds to the middle of the stream. But where one state is the original proprietor, and grants the territory on one side, as in the cession by Virginia of the territory northwest of the Ohio river, it retains the river within its domain and the boundary of the lands ceded extends only to low-water mark.

§ 63. **Fixtures.**—There is much controversy as to what is a proper definition of a fixture. A fixture is something annexed to land, as buildings, machinery or the like. Sometimes the manner and purpose of the annexation makes it a part of the realty, sometimes though annexed in a permanent manner it retains its character of personalty. The chattel must not only be laid upon the land, it must be annexed, set into, or fastened upon it, to become a part of the realty. Nor will every such annexing make it part of the realty. If a tenant puts a building or machinery upon land with the express agreement with the landlord that at the end of the term it may be removed, it does not become a part of the realty, unless during or at the end of the term he fails to remove it. But where the duration of the tenancy is uncertain, the law allows the tenant a reasonable time for removal of fixtures after the end of the tenancy. The general rule is that in the absence of a valid agreement to the contrary, fixtures once annexed become part of the land, so that conveyances, mort-

gages or other liens upon the land cover them. When the tenant puts up trade fixtures to be used in connection with his particular business, it has been held to be such a declaration of intention as to prevent their becoming part of the land. The old rules have been relaxed, so that it may be said that as between landlord and tenant, the latter may remove all such fixtures of a chattel nature as he himself has erected on the premises for ornament, domestic convenience, or to carry on trade, provided that such removal may be made without material injury to the freehold. The rule is modified sometimes by the usages and customs of particular localities or trades.

As between vendor and vendee, the rule is that all fixtures attached to the land by the vendor, and on the land at the time of the sale, pass to the vendee, unless they are expressly reserved by the terms of the contract of sale.

§ 64. As between heir, devisee and executor, the rule is that fixtures annexed to the land by the testator go to the heir or devisee, and the executor has no right to them, unless the intent of the testator to have them treated as personalty has been plainly expressed. In an early case in Ohio the following were enumerated as the requisites of a fixture: (1) That it be actually annexed to the realty, or something appurtenant thereto. (2) That it be appropriate to the use or purpose of that part of the realty with which it is connected. (3) That it be intended by the party making the annexation to be a permanent accession to the freehold. What the intention was in making the annexation is inferred from the following facts, viz., the nature of the

article annexed; the relation of the party making the annexation, whether owner, tenant, etc.; the structure and mode of annexation; the purpose or use for which the annexation has been made.

§ 65. **Boundaries.**—Land has an indefinite extent, upwards and downwards. No man has a right to erect a structure, any part of which overhangs the the land of another. If a tree planted on one man's land extends its branches over the adjoining premises, to the injury of another, the owner is responsible for the damages caused thereby, and the injured party may remove so much of it as overhangs his premises. A grant of land carries everything on it or beneath it, whether it be woods, houses, waters or metals,—in a word, it carries everything terrestrial.

§ 66. Boundary lines may be fixed by agreement. They may be established by prescription. They may be settled by the conduct of the parties amounting to an estoppel. In the absence of these the law fixes boundary limits as a matter of policy, and in the interest of peace. A grant of land bounded by a navigable river, where the tide ebbs and flows, extends only to the high-water mark, but it has been held that, subject to government supervision and control, the owner of adjacent lands has the right to erect wharves and piers extending to low-water mark.

§ 67. **Land bounded by highways.**—Where a public road is the boundary line, the owners of land at each side own to the center of the road, and they have the exclusive right to the soil, subject to the right of passage by the public, and may use it in any way which does not impair the public right. This rule

as to ownership to the center of the road will always prevail unless there is an express abandonment of the right by the owners. If, under the power of eminent domain, the highway is appropriated in whole or in part for any other public use, the adjacent land-owners are entitled to compensation for such increased burden.

§ 68. **Appurtenances.**—In grants of land, the phrase, "and all appurtenances," is commonly used. An appurtenance is a thing belonging to another thing and which passes as incident to the principal thing. It is inferior to the thing granted, but of the same nature. Land can not be appurtenant to land, and a conveyance of land bounded by the line of an adjoining highway will pass no title to the soil over which the highway passes, but the grant will give the grantee a perpetual right of way as an appurtenance. As a general rule, a grant of land carries with it as appurtenances all apparent benefits and easements that are incident to it and necessary to its beneficial enjoyment, and which the grantor had full power to convey; and they pass, whether acquired by grant or prescription, or originally incident to the estate. A grant of a mill with appurtenances covers the head of water by which it runs, also all water rights and privileges used with and incident to it. It is not necessary to use the term, "appurtenances," to convey rights that actually are such, for they pass as incident to the land, whether that term is employed or not.

CHAPTER VIII.

INCORPOREAL PROPERTY.

§ 69. **Kinds of incorporeal property.**—Judge Cooley criticises Blackstone's definition of an incorporeal hereditament as "a right issuing out of a thing corporate (whether real or personal) or concerning or annexed to, or exercisable within the same," and defines it as "any intangible right which is capable of being inherited, though it may exist wholly independent of any corporeal property whatsoever."

Blackstone says there are ten sorts of incorporeal hereditaments: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents.

§ 70. **Advowsons.**—Advowson is the right of presentation to a church, the right of the lord of a manor to designate what parson shall minister to the parish and enjoy the living appurtenant to it. This subject has no place in American law, under which all religious societies are purely voluntary, and pastors are chosen as the people see fit, or as the usages of the particular ecclesiastical organizations prescribe.

§ 71. **Tithes.**—Strictly speaking, tithes are a tenth of the annual increase and profits of lands and stock upon lands and the personal industry of the inhabitants. In all countries where there are religions es-

tablished and maintained by public law, provision is made for the support of the clergy. It is supposed that tithes were introduced in England in the sixth century, when Augustin, the monk, planted Christianity among the Saxons. The first decree enforcing the payment of tithes was made A. D. 786. At first, these tithes were paid to the bishops, who allotted them among the clergy of their dioceses, but when the bounds of the parishes became definitely fixed, the tithes were paid directly to the priests of the several parishes. Sometimes, by agreement between the land-owner and the parson, some land or other recompense was given in lieu and satisfaction of tithes. And sometimes by prescription certain lands or persons were exempted from the payment of tithes. A *modus*, as it is called, was a special manner of tithing, whereby the general law was altered as where something in lieu of the tenth part of the annual increase was paid to the parson. To make a *modus* good, it must be certain and invariable. The thing paid must be beneficial to the parson. It must be different from the thing compounded for. It must be as durable as the tithes discharged by it. Although interesting as a historical study of the growth and progress of the law, it is not deemed wise or profitable to consider more fully in this place these matters which do not enter into the practical administration of the law in this country.

§ 72. **The right of common.**—This is defined to be a profit which a man hath in the land of another. By the English law, the lords of manors were required to allow certain of the manorial lands to remain unenclosed, upon which the inhabitants could

pasture what were called commonable beasts, which were either beasts of the plow, or such as manure the ground. As lands became more valuable, the lords of the manors began to enclose the commons, and parliament in the reign of George III enacted a law which has been repeatedly amended, regulating the inclosure of commons. The right of common in the United States is a narrow right. In tide-waters the right of taking fish is common to all citizens. In rivers where the tide does not ebb and flow, it is said that the proprietor of the bank has an exclusive right of fishery to the thread of the stream, but it has been held that in large navigable rivers, such as the Susquehanna, the public at large have a common right of fishery. For the taking of fish where the public have the right, no person can lawfully go upon the land of another without license. In ordinary streams within the boundaries of a man's land, or where the stream is the dividing line between two proprietors, no one has a right to fish without the license of the riparian proprietors.

Kent sums up the American doctrine thus: The right of fishing in navigable or tide waters below high-water mark is a common right. In streams not navigable, the owners of adjacent lands have the exclusive right of fishing each on his own side. Such right is held subject to the public use of the waters as a highway and to the free passage of fish.

§ 73. **Right of way.**—The right of way is the right of going over another man's land. Ways are either public or private. A public way may be established either by the dedication of the owner of the land, or by the appropriation of a man's land for the purpose

in proceedings at law, under the authority of the state by virtue of its right of eminent domain.

And first of the manner in which the owner may dedicate his land as a public way. Dedication is the setting apart of land for public use. It is essential to every valid dedication that it should conclude the owner, and that as against the public it should be accepted by the proper local authorities or by general public user. There are two kinds of dedication, statutory dedication and common law dedication. Where the statute requires that the dedication shall be evidenced in a particular way, as by plats or maps, and that they shall be acknowledged before some competent officer, these requirements must be strictly complied with. Unless the proper local authorities accept the dedication, such ways can not properly be called public highways, in the sense that the expense of maintenance can be cast upon the public. But where lots have been purchased, according to plats or maps showing certain streets and alleys upon them, these alleys and streets will be kept open as ways for the benefit of such persons as have made such purchases. A statutory dedication is by way of grant, a common law dedication arises by way of an estoppel *in pais*. No writing is necessary to a common law dedication—no formality. The mere throwing open the land to the use of the public for a way is a dedication if the public accepts it. It must be clear, however, that the land-owner intends to give the right. The fact that the owner acquiesced in the use of the way by the public for twenty years is sufficient evidence of intent. If the public are in the habit of using such a

way, and the owner does not wish to dedicate it, he can by unequivocal acts assert his right, as by putting gates or fences across the way even once in a year. It has been said that one act of obstruction by the owner is better evidence of intent than years of acquiescence in the use by the public. But if the use is continuous and uninterrupted for twenty years the way is established. Dedication may arise in a shorter period than twenty years, when the intent to dedicate is positive and manifest, and the question of intent is a question of fact for the jury. When a dedication is once made it can not be revoked.

§ 74. **Private rights of way.**—Private rights of way are of two kinds: Those which are purely personal and can not be assigned, and those which are appurtenant or annexed to an estate and pass with a conveyance of the estate. A private way may be created by a grant, or it may arise by operation of law or necessity. It arises by operation of law or necessity where one sells a parcel of land which is surrounded wholly by the lands of the grantor or by his lands and the lands of others. In such case, the vendee has the right of way over the lands of the vendor to the public highway. The right to locate the way rests first in the vendor. If he fails to locate it within a reasonable time in a convenient manner, the right to locate it is in the vendee, and when once located it must be adhered to. The doctrine of dedication has no application to a private way, though that right may be established by uninterrupted user for twenty years. To make good a private way by prescription, the use must be definite as to manner and location. It must be under a claim adverse to the owner and not un-

der license. It must continue for the whole period, *i. e.*, twenty years, without interruption.

§ 75. **Temporary rights of way.**—There is a temporary right of way over the adjoining land if a public highway becomes impassable, as by the falling of a tree, the washing away of a bridge or a part of the highway itself. But this is not so of a private right of way, the reason being that the owner of the way may be bound to repair, and the condition of the private way may be owing to his neglect; but if a public highway becomes impassable, it is for the general good that the people should be entitled to pass in that direction.

§ 76. **Easements.**—An easement is a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. We have already spoken of rights of way, both public and private, which are both easements. To these may be added the right to water cattle at a spring or pond or stream on the land of another, the right to take and use such water for domestic purposes, the right of the owner of a building to discharge the water from his roof upon another's land, the right to swing doors, shutters, gates over another's land, the right to lay pipes to conduct water, gas, sewage, the right to put a partition fence or a party wall partly on the land of an adjacent proprietor. A mere permission by one land-owner to another to use his land for a given purpose is a license, and will not be an easement. An easement by prescription can only be perfected in the manner pointed out as to rights of way.

A party wall is a wall built by agreement on the division line of estates, which each proprietor has a right to use as a support to buildings. Each owner of land has an easement in the adjoining land for lateral support of his land in its natural state. This easement does not extend to any structures which increase the weight. In constructing a party wall, the builder must erect it in a skillful manner, and if he does not do so he is liable for any damage that may result. Either party may repair the wall by underpinning, or increasing its height, but he must be careful that no damage is occasioned thereby. Where one erects a wall partly on the land of another, who sees it and has reason to believe that the builder looks to him for contribution, the jury may, from such conduct, infer that he agreed to pay for it. Express agreements of the parties in relation to the building, use, repair and payment for party walls are binding. It is an unsettled question, however, whether such agreements continue in favor of and against the assignees or grantees of the parties who make them.

Easements may be lost by non-user where an intention to abandon may be inferred. They are extinguished where the same party becomes the owner of the dominant and servient estates, the maxim being that no man can have an easement on his own land.

§ 77. **Offices and dignities.**—Offices and dignities, which are mentioned by Blackstone as incorporeal hereditaments, can not be so considered in a country where most offices are elective at stated times for limited terms, and where none are held longer than

during good behavior. Officers in private corporations are mere agents, whose authority and duties will be treated of in their appropriate place.

§ 78. **Franchises.**—A franchise is a special privilege conferred by government on individuals, which does not belong to the citizens of the country generally by common right. Kent defines it as a particular privilege, conferred by grant from the government and vested in individuals. In a popular sense, it is synonymous with right or privilege, as the elective franchise. Among the most important of modern franchises is the right to be a corporation, the franchise to control a toll road, or bridge, to keep a ferry.

§ 79. **Rents.**—Rents are a species of incorporeal property. Rent is a compensation given for the possession of some corporeal inheritance. It may be paid in money, in kind, by services, or in any manner agreed upon by the parties. Rent is regularly due and payable on the premises from which it arises. Where a forfeiture of a term for non-payment of rent is attempted, the rent by the old rule was strictly demandable and payable before the time of sunset of the day whereon it is reserved, but now it is not considered due until midnight of the natural day on which it is payable. The day of payment is usually fixed by the contract, and when this is silent it is payable monthly or quarterly, according to the custom prevailing at the time and place.

§ 80. **Liens.**—A lien is the right of a creditor to have his debt or demand satisfied out of specific property. Liens may be classified as statutory, equitable, created by contract or common law liens. The

lien of a state or municipality for taxes, liens given to contractors, material men and laborers upon houses or other structures upon which they have bestowed labor, or for which they have furnished material, liens of judgments, are created by statute. An artisan or mechanic who receives material with which he constructs an article for another, or receives an article to be repaired, has a lien upon the article for his labor. An innkeeper has a lien upon the baggage and personal effects of his guest for his board and lodging. A carrier or a workman has a lien for his charges. An attorney has a lien upon papers or funds of his client in his possession for his services. A banker has a lien on his debtors' funds in the bank. These are examples of common law liens. A creditor of a failing or insolvent debtor has a lien upon his assets; a seller of land who receives a part of the purchase-money has a lien upon the land for the unpaid balance; a partner who has advanced money to the firm has a lien upon the interests of his copartners. Persons not bound by any obligation to do the service, who perform labor in saving a ship or her cargo, or the lives of persons belonging to her, from danger or loss in cases of shipwreck, derelict, capture or the like, are salvors and have a lien upon the ship and cargo for the value of the services so rendered. These are some examples of equitable liens.

§ 81. Liens by contract are created by the express agreement of the parties, as in case of a loan of money, when at the time the loan is made the borrower either verbally or by written instrument pledges a specific piece of property as security for

the repayment of the money. When the property is personal and is placed in the hands of the lender, it is a pledge. When the borrower retains possession, but executes and delivers to the lender an instrument in writing, giving the lender the right to have his debt paid out of the property described in the instrument, it is a mortgage which creates a lien upon such property, which may be enforced by foreclosure, if the debt is not paid at maturity.

CHAPTER IX.

THE FEUDAL SYSTEM.

§ 82. **Its origin and nature.**—While it is not intended, nor is it necessary here, to give a minute account of the feudal system of England, some acquaintance with its principal features is requisite to an understanding of the subject of estates in land. The germs of a feudal system existed among the Romans, but in its entireness it never subsisted anywhere before it arose in the middle ages in those parts of Europe in which the Germanic nations settled themselves after the subversion of the Roman empire. The essential character of the estate denominated "feud," or "fief" was that from the first and always it continued to be not an estate of absolute ownership. The property, the ownership remained in the grantor, the grantee was a mere tenant. Originally, these "fiefs" were resumable at the pleasure of the grantor, which made the tenure precarious and kept the tenant in a state of timorous vassalage. To incur the displeasure of his chief or grantor meant expulsion from his estate. The grantor was known as the suzerain or lord, and the grantee as vassal or tenant. Subsequently, the relation of lord and tenant was ameliorated, first by giving the tenure a fixed duration for a term of years. Later still, the relation and tenure became permanent, the

vassal taking an oath of fealty to his lord, in which he bound himself to render fixed services, in return for which he was to have his lands, so long as the service was rendered. The obligation was mutual and an attempt of the lord to dispossess a tenant, who was faithful, was looked upon as an act of injustice. These fiefs were then extended to life tenures. Then they became descendible to the eldest son, and afterwards to the collateral lines, and still later they became inheritable by females. When fiefs first became hereditary is a matter of dispute with historians, but in all the changes in the system the relation of lord and tenant survived, the ultimate property was still in the lord. Even after fiefs became descendible, the new occupant was required to make a new oath of fealty and acknowledge his vassalage, and thus obtain, in form at least, a new grant from his lord, and he was bound to the same service which was the consideration for the first grant. In case of the extinction of the descendible line, or where the fief was lost or forfeited by the crime of the vassal, it escheated to the lord. At first it was only sovereign princes who granted fiefs, but when they became hereditary and fixed, the vassal himself would grant portions of his fief to others, and thus there grew up the practice of subinfeudation.

§ 83. **Allodial estates.**—Fiefs were not the only sort of land tenures in the ancient Germanic provinces. Some lands were allodial, that is they were held by absolute and independent title, and the holder owing no fealty to an over-lord was free from the exactions and burdens to which the holder of a fief was subject. But this freedom from vassalage

had its disadvantages. If the holder by such a tenure owed no fealty, he did not enjoy the protection of a superior, which was due to a vassal who held a fief. Wars were frequent among the feudal lords, and these allodial proprietors were often the victims of oppression. They were without organization, had no superior, and were at the mercy of their more powerful neighbors. This led to a surrender of their tenures to the lords, to whom they made their oath of fealty and secured protection. This absorption of the allodial lands was general in Italy, France, Germany, and England. William, the Norman, had witnessed in France the evil effects of the divided allegiance of the people. The vassal's first and paramount allegiance was to his lord, and in cases of conflict with his king, the vassal was true to his immediate protector. After the conquest, William imposed new conditions upon those to whom he gave the lands of England. The vassal took a double oath, first to the king and under him to the lord. So that Coke could say, in writing of English tenures, that "All the lands and tenements in England in the hands of subjects are holden mediately or immediately of the king; for in the law of England we have not properly allodiam."

§ 84. **Wardship and marriage.**—Some of the incidents of the system, as it existed in some parts of Germany and France and in England, bore with oppressive weight upon the vassals. These were the incidents of wardship and marriage. The lord was guardian of the person and estate of the infant tenant during minority, and the profits accruing therefrom added greatly to the lord's revenues. So, be-

fore a female ward became of age, the lord claimed and asserted the right of tendering her a husband. If she rejected the offer she forfeited the value of the marriage, that is, as much as any one would give to the lord for permission to marry her. This right was extended to male and female heirs, and also to widows.

§ 85. **Local courts.**—The grant of land as a fief was usually accompanied by a grant of jurisdiction, under which local courts were established, in which legal controversies arising among the subjects living within the bounds of the manor were adjudicated. These manorial courts founded by the Normans exist under different names in England.

§ 86. **Homage and fealty.**—Primarily, the feudal tenure was based upon the obligation or duty of the vassal to render military service to his lord. When the fief was granted, the vassal made homage to his lord in this fashion: "He shall be ungirt and his head uncovered, and his lord shall sit and the tenant shall kneel before him on both knees, and hold his hands jointly between the hands of his lord and shall say thus: I become your man from this day forward, of life and limb and of earthly worship, and unto you shall be true and faithful, and bear you faith for the tenements that I claim to hold of you, saving the faith that I owe to our sovereign lord, the king; and then the lord, so sitting, shall kiss him." The obligation of homage, says Fleta, is mutual, binding the lord to protection of the vassal, as well as the vassal to fidelity. Homage was done without an oath, but when a freeholder did fealty to his lord it was required that, "he shall hold his right

hand upon a book and shall say thus: 'Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do at the terms assigned, so help me God and His saints,' and he shall kiss the book. But he shall not kneel when he maketh the fealty, nor shall make such humble reverence as is aforesaid in homage."

§ 87. **Military service.**—The extent of military service due to the lord from his tenant or vassal was indeterminate at first, but afterwards, as the vassal became more independent, it was fixed by usage or custom at forty days on every occasion in which his lord required his services. Women and the clergy were obliged to send substitutes. Certain public officers were wholly exempt from personal military service. The other duties of the vassal, as Mr. Hallam gives them, were as follows: "It was a breach of faith to divulge the lord's counsel, to conceal from him the machinations of others, to injure his person or fortune, or to violate the sanctity of his roof and the honor of his family. In battle he was bound to lend his horse to his lord, when dismounted; to adhere to his side while fighting, and to go into captivity as a hostage for him when taken. His attendance was due at the lord's courts, sometimes to witness and sometimes to bear a part in the administration of justice."

§ 88. **Other obligations of the tenant.**—We have mentioned wardship and marriage as two of the incidents of the relation of lord and tenant which were a source of pecuniary profit to the lord. His reve-

nues were replenished by other means. Every new entrant upon a fief paid a sum of money which was called a "relief." When a tenant left no heir or forfeited his estate for crime, it escheated to the lord. When a tenant sold any part of his fief, a fine was paid for the permission to sell, and finally there were sums paid for various "aids,"—to ransom the lord when a prisoner, to make his eldest son a knight, to marry the lord's eldest daughter by giving her a portion. The amount of the last two was fixed by act of parliament in time of Edward III, at twenty shillings each, but these aids were wholly abolished in the reign of Charles II.

§ 89. **Domesday Book.**—King William, when he felt secure in his possession of the English throne, held a council to inquire into the state of the nation and by his order the Domesday Book was compiled. This book contains minute and accurate surveys of the lands of the kingdom. The work was committed to five justices in each county, in the year 1081, and it was finished in five years. This book, or books, for it consists of two volumes, is preserved in the chapter house at Westminster. It gave the king full information as to the military resources of the kingdom, and has been invaluable to the English people in settling disputed boundary lines.

§ 90. **Escuage.**—As the hereditary character of fiefs became established, the tenant ceased to be dependent and subject to his lord. In course of time, a pecuniary payment became the sole method by which the tenant discharged his obligations. Henry II found it inconvenient to keep the military force of the kingdom in a state of efficiency, and he dis-

pensed with the personal military services of the vassals, and substituted in lieu thereof the payment of a fixed sum called "escuage," which is simply another name for taxes, as we now know them.

§ 91. **Changes in feudal system.**—The practice of subdivision and sale of feuds worked great changes in the rules of tenure and succession. This practice became so common that it caused alarm, and by a provision of the charter of Henry III, subinfeudation was restricted, and in the time of Edward I it was forbidden. As a substitute, lands were allowed to be sold, but the purchaser took and held title just as his grantor did. This applied to sales of a man's entire interest in land, and was held not to prohibit the voluntary alienation of land by persons during their lifetime. Under the feudal system, lands could not be sold for debt. By degrees, however, the power of the creditor over the debtor's land was increased, until by the modern statutes of bankruptcy in England the whole of a bankrupt debtor's lands have become absolutely salable for the payment of his debts. So by a statute (3 and 4 Wm. IV, c. 104), all a deceased person's interest in land of whatever kind, not charged by his will with payment of debts, whether he was a trader within the bankrupt laws or not, constitutes assets to be administered in equity for the payment of debts.

§ 92. **Abolition of the system.**—In spite of these changes in some parts of the ancient feudalism, many of its substantial provisions remained in force and it was not until after the civil war, which began in 1641, that the profits of wardship and marriage,

and other feudal prerogatives, were swept away. The court of wards was discontinued in 1645, and it was further enacted that all wardships, liveries, primer seizins, values, forfeitures of marriage, etc., by reason of any tenure of the king or others, should be totally taken away, and that all fines for alienation, tenures by homage, knight-service and escuage, etc., were abolished. Of which statute Blackstone says: "It was a greater acquisition to the civil property of this kingdom than even Magna Charta itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigor; but the statute of King Charles extirpated the whole, and demolished both root and branches. (12 Charles II, c. 24.)

CHAPTER X.

ANCIENT TENURES.

§ 93. **Tenure.**—Before quitting this branch of the subject, and proceeding to a consideration of modern English tenures, and the law of tenures as it prevails in the United States, let us by way of summary or recapitulation give the nature and definitions of the ancient English tenures, as they existed under the laws of feudalism.

§ 94. All real property was holden of some superior, in consideration of certain services to be rendered to the lord by the tenant or possessor of the property. The thing holden was a tenement. The possessor was a tenant. The manner of possession was tenure.

§ 95. **Lord paramount.**—The king, because all land was holden mediately or immediately of him, was lord paramount.

§ 96. **Middle lords and tenant paravail.**—Persons who held immediately of the king, and granted portion of their lands to others, were called middle lords. The grantee of the middle lord was called tenant paravail, or the lowest tenant.

§ 97. **Free and base tenure.**—These tenures were held by four different kinds of service. As to quality they were free or base, as to quantity certain or uncertain. Free services were such as were not unbe-

coming to a soldier, such as fighting for his lord, or paying a sum of money. Base services were servile, plowing, making hedges and the like. Certain services were fixed in quantity, as to days of military service or payment of a fixed sum. Uncertain services depended on unknown contingencies.

§ 98. **Frank-tenement and villenage.**—From these services arose four kinds of tenure. Tenements were of two kinds, frank-tenement and villenage. Some frank-tenements were held in consideration of homage and knight service; others in free-socage, with the service of fealty only. Of villenage, there was pure villenage and privileged villenage. A tenant by pure villenage was bound to do whatever was commanded him, and he was bound to an uncertain service. A tenant by villein socage was bound to do villein service, but it was certain.

§ 99. **Knight service.**—Of these, knight service was the most honorable. For a knight's fee, estimated at twelve plowlands (about one hundred and twenty acres) each tenant must attend his lord to the wars for forty days in every year, if called upon; if he held less than a knight's fee, his service was to be in proportion. These were the original services, and the other incidents grew up by a series of fraudulent impositions.

§ 100. **Aids.**—Aids were at first mere benevolences granted by the tenant to his lord in time of difficulty and distress, but in time they grew to be matters of right. There were three, viz., to ransom the lord, to make his eldest son a knight, and to marry his eldest daughter.

§ 101. **Relief.**—Relief was a fine or sum of money

exacted by the lord from the new tenant when the estate lapsed by the death of a former tenant.

§ 102. **Primer seizin.**—Primer seizin was a sum of money equal to a year's profits of the lands from the heirs of a tenant *in capite* (one holding immediately of the king), which the king exacted.

§ 103. **Wardship.**—Wardship gave the lord the custody of the lands and person of the tenant under age without being compelled to account for profits.

§ 104. **Marriage.**—Marriage was the right of the lord to select a husband or wife for his ward, and if his selection was rejected, he could recover whatever a jury would assess as damages, or as much as any one would *bona fide* give for the alliance.

§ 105. **Fines.**—Fine was a sum exacted from a tenant for a license to sell part of his holding.

§ 106. **Escheat.**—Escheat was the resumption of the fee by the lord, when issue failed or where the estate was lost by the crime of the tenant.

Brave and spirited people became restive under these onerous burdens, and but for the statute of Charles II, above quoted, which abolished these exactions, the monarchy itself might have been subverted.

CHAPTER XI.

MODERN TENURES.

§ 107. **Influence of feudal system.**—Judge Cooley, speaking of tenures in America, says: "Although the feudal system never obtained much foothold in this country, there are many things in our law of real estate which require for their understanding that we bear in mind the fact that the American system is based upon the common law of England, and that that law grew up while the feudal system was in force. As lands in England were held under that system, and its maxims thoroughly pervaded the law of real estate, it was not to be expected that when grants of land were made in this country under circumstances unknown in England, a new system of law with new terms and maxims would at once spring into existence to provide for the new condition of things and bearing no trace of the system which it supplanted."

§ 108. As a matter of fact, however, the early grants in America were made with a reference to a continuation of something like a feudal tenure, and many incidents of that system attached themselves to these grants. The tenure prescribed was tenure in free and common socage, to be held of the king, as of some manor in England. When the colonies threw off allegiance to the crown, and became inde-

pendent states, each of them succeeded to all the rights of the crown within its limits, while the United States as a sovereignty succeeded to all the rights of the crown to unoccupied territory not within the limits of any of the states and not previously conveyed.

§ 109. **Revival of allodial tenure.**—Being thus possessed of the vacant lands, the United States and the several individual states have proceeded to make sale and conveyance thereof and to give titles which, though called fees, are in truth allodial. At the same time the states by statutory and constitutional provisions have gradually abolished such of the feudal incidents as still attached to the estates previously granted by the crown, until, as Chancellor Kent says, 3 Com. 513, "By one of those singular revolutions incident to human affairs, allodial estates once universal in Europe, and then almost universally exchanged for feudal tenures, have now after the lapse of many centuries regained their primitive estimation in the minds of freemen."

§ 110. In America as in England the sovereignty is recognized as the source of all title, and the state succeeds thereto in default of heirs; but this right is not peculiar to the feudal system; neither is eminent domain, which is sometimes referred to as a remaining incident of the feudal system.

§ 111. **Estates.**—An estate in lands, tenements and hereditaments signifies such interest as the tenant has therein. An estate is either for an uncertain period, as for life, for a certain period of years, or unlimited, as when it is vested in a man and his heirs forever, without mentioning what heirs. This

last is an estate in fee-simple, which is the largest estate a man can have in lands.

§ 112. **Fee-simple.**—The fee-simple, or inheritance of lands, is generally vested in some person or other. Inferior estates may be carved out of it. One may have the fee-simple, another may have a term for years, another may have a life-estate, another may have the right of possession, another may be in actual possession, of the same land.

§ 113. **Fee-simple in abeyance.**—A fee-simple may be in abeyance, according to Blackstone, as where there is a grant to John for life, and afterwards to the heirs of Richard. The fee in such can not vest in the heirs of Richard till his death, because no one can be an heir of the living, and John has plainly a life-estate only. The fee, therefore, is in abeyance while Richard lives. The inconvenience resulting from this notion has led some learned writers to repudiate it. Kent says that though the good sense of the thing and the weight of liberal doctrine are strongly opposed to the ancient notion of an abeyance, the technical rule is that livery of seizin takes the reversion of the inheritance from the grantor, and leaves him no tangible or disposable interest. He cites Preston on Estates as insisting that an estate in freehold, depending on another estate of freehold and limited on a contingency, must be in abeyance.

§ 114. **Use of word "heirs."**—At common law, where it was intended to convey a fee-simple estate by deed, the word "heirs" was essential. In many of the United States this strict rule has been abrogated by statute. In some states a form of deed is prescribed by statute,

which prescribes what the effect may be. The short form in Indiana, which is in substance, "A conveys and warrants to B" certain land, describing it, is held to be sufficient to convey the land, with the appurtenances and hereditaments to the grantee, his heirs and assigns with covenants of seizin and warranty, as fully as if these words and the full covenants were written in the deed. A government grant in any form the legislature may prescribe will take effect according to the legislative intent. A grant to a sovereignty requires no words of inheritance. The strict rule requiring the use of the word "heirs," to create or convey a fee, has no application to wills. Where the testator's intention to create an estate of inheritance is manifest from the whole will, it will be so construed. Some states have gone so far as to enact by statute that every devise of land shall be construed to convey a fee-simple, unless it appears by express words that a less estate was intended.

In suits to compel the specific performance of agreements to convey land equity will sustain the right of a party asking a conveyance in fee where it appears to have been the intention of the parties to contract for a fee.

§ 115. **Estates for life.**—Estates for life are next in importance. These outrank estates for hundreds of years, because it is said that no one knows how long a man may live. Where an estate for life is carved out of a fee the land comes back to the grantor when the estate for life ends, and that which the grantor has is an estate in reversion; if, however, a grant is made for life to one, and at his death to an-

other and his heirs, this latter takes a remainder in fee. An estate for life may be for the life of the grantee or for the life of another. An estate for life in this country terminates with the natural death of the person. Civil death, as it is called in England, is not now known in this country. When one entered a monastery he was civilly dead, and in this country under the first general bankrupt law the bankrupt was regarded as civilly dead.

§ 116. **Rights of life tenant.**—The life tenant has certain rights determining the use he may make of the property. He may take such wood and timber as may be necessary to keep up the buildings and inclosures and to supply him with fuel. He has no right to cut down timber and sell it for mere profit, but if there is a disproportion of woodland to arable land he may make a clearing; that is, he may remove the growing timber and dispose of the same so as to increase the arable land. The general rule is that he is entitled to the temporary use of the estate as he finds it, but in the United States, whether cutting any kind of trees in any particular case is waste seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether the doing of it would diminish the value of the land as an estate.

§ 117. **Emblements.**—On the death of a life tenant his representatives have a right to the growing crops, upon which the tenant has bestowed his labor. In fact, whenever one holds lands for an uncertain term, and dies, the emblements, or growing crops, which are the fruit of his labor, go to his repre-

sentatives. The mere preparation of the land for sowing will not give such right unless the tenant has planted.

§ 118. **Taxes and interest.**—The life tenant who receives the profits of the land must keep down the taxes, and if when he comes to the estate it is incumbered, he must pay the interest on the incumbrance, though he is not bound to discharge the principal.

§ 119. **Waste.**—If a life tenant commits or permits waste, he may be enjoined at the suit of the remainderman or reversioner. If he permits taxes to become delinquent, so that the estate is in danger of being sold, the courts will sometimes, upon a proper showing, decree a forfeiture of the life-estate.

§ 120. **Estates for years.**—An estate for years is where one is entitled to the possession and profits of land for a certain period. This estate is always created by the acts of the parties. The instrument creating it is termed a lease, and the parties are landlord and tenant. The execution and delivery of the lease perfects the title of the tenant. Sometimes these leases are practically interminable, though in form and theory they are for a fixed term, as where one leases lands for a term of ninety-nine years, renewable forever. It is quite common for railway companies to lease their lines to other companies for a period of nine hundred and ninety-nine years, and yet in law such estates and terms are deemed to be of less dignity than a life-estate. In some particulars the rights of the tenant for years are the same as those which belong to the tenant for life. The tenant for years has no right to emblements, for the term of his tenancy is fixed, but he may take timber suf-

ficient for fuel and to keep up the repairs of buildings and enclosures, and he may sublet the premises, unless that right is cut off or restricted by the terms of the lease, and he is liable in damages for waste, and may be enjoined in equity from committing or permitting it.

§ 121. Rent.—Rent, according to Blackstone, is "a certain profit arising yearly out of lands and tenements corporeal," or it is a periodical compensation in money or otherwise agreed to be given by the tenant to the landlord for the use of realty, the payment of which may be enforced like any other demand. One occupying the land of another, where there is no contract to pay a specific rent, is liable not for rent as such, but for the use and occupation of the premises, the amount to be reasonable, and in cases of dispute to be fixed by the jury.

If a tenant is evicted by a title superior to that of his landlord, the obligation to pay rent ceases; but so long as he remains in possession, neither the right of the landlord to demand rent nor the landlord's title can be disputed by the tenant.

A destruction of the premises by some inevitable accident will not exonerate the tenant from liability to pay rent for the unexpired term unless the lease contains a stipulation to that effect. There are exceptions to this rule, as where one rents apartments in a block and the whole structure is destroyed, the obligation to pay rent ceases. And it has been held that where the premises are destroyed after the execution of a lease, and before the lessee has taken possession, the tenant is not liable, and so a contract for a term to begin in the future does not bind the

tenant to pay rent, if before the beginning of the term the premises are destroyed. And in case of a partial destruction of a building, if the insurance company takes possession to restore the premises, the tenant is not liable for rent, while the insurance company occupies the building for that purpose.

Where a lease provides for a forfeiture for non-payment of rent when due, a tender or readiness to pay on the premises at any time before sunset on the day stipulated will be sufficient. If a different place for payment is designated in the lease, the payment or tender must be made there.

§ 122. **Duration of tenancy.**—In ascertaining the time of the beginning and ending of a term where the words "month" and "year" occur in leases the Gregorian calendar is used, by which the beginning of the year is January 1. Prior to the year 1752 the Julian calendar, fixing the beginning of the year on the 25th of March, was used. When the word year occurs in a statute or contract it is to be understood as meaning the whole twelve months according to the calendar, unless a contrary intention is clearly expressed. The period of time is always to be settled according to the intention of the parties. At common law a month meant a lunar month, but now it is held to mean a calendar month, both in England and the United States. A natural day is full twenty-four hours, and in legal contemplation the legal day is without fractions, but if two acts are performed on the same day and it is important which was first in time, evidence will be heard to fix the exact hour and minute. This becomes important in disputes as to the priority of liens, deeds, time of re-

cording and the like. In computing time from the day of the date, or from a certain act or event, the day of the date or act is to be excluded, unless it is clear that the parties to the instrument had a different intent. A week means a full week of seven days, and if by statute or rule of court a notice is to be published for a certain number of weeks, the publication is not completed until the number of weeks has fully expired from the date of the first publication. Thus, if the publication is to be once in each week for six successive weeks, and the first publication is on Tuesday, the publication is not completed without including Monday of the seventh week, which is the forty-second day, and whatever was to be done dependent on such publication could not be done earlier than Tuesday of that week. When the day for the performance of an act or the payment of money falls on a legal holiday, the next business day following is the one on which performance or payment is to be made; except, however, that where days of grace are allowed, and the last day of grace falls on a legal holiday, the next preceding business day is the day for payment. The computation of time and the meaning to be given to terms such as "month," "year," etc., are often the subject of statutory regulation, and where there is a conflict, statute law supersedes and displaces the common law.

§ 123. **Distress.**—Distress was a right which the landlord had at common law to seize and hold the tenant's personal property to enforce the payment of rent. It became unpopular in the United States, has been abolished in some of them by statute, and has been superseded by the ordinary remedies

for the recovery of money due. Some states give the landlord a first lien upon all crops for the security of his rent.

§ 124. **Apportionment of rent.**—During the existence of the tenancy the landlord or reversioner may sell part of the leased premises. In such cases the rent is apportioned and paid to the new owners in proportion to the value of the land.

§ 125. **Estates at will.**—An estate at will was formerly when a tenant occupied at the mere pleasure of him who had the next estate. The landlord could terminate it any moment without notice. This harsh rule was modified at first, so that an estate at will was equally at the will of both parties, and later it became settled that unless there was an express agreement to hold at will, such tenancies should be construed as estates from year to year. These changes have virtually abolished the old tenancy at will, and now such estates are determinable by notices to quit, and the form and length of time for giving notice is regulated by statute. Tenants holding such estates are entitled to emblements, owing to the uncertainty of their tenure.

§ 126. **Estates at sufferance.**—An estate at sufferance is where one who comes lawfully into possession of land holds over after his interest is determined. And while he is not liable strictly for rent as such, he is liable for such sum as may be reasonable in an action for use and occupation. In some states, a penalty in addition to this is awarded against one who unlawfully deprives the owner of the use of his land.

§ 127. **Base fee.**—A base or qualified estate in

fee is an interest which may continue forever, but may be determined without the aid of a conveyance by some act or event circumscribing its duration. A limitation to a man and his heirs, so long as he shall have heirs of his body, or so long as St. Paul's church shall stand, are examples of this sort of an estate. The owner of such an estate has all the rights of an owner of a fee-simple, until his estate is determined. Such estates are called base because their duration depends upon the occurrence of collateral circumstances which qualify and debase the purity of the fee.

§ 128. **Conditional fee.**—A conditional fee is one which restrains the fee to some particular heirs exclusive of others, as to the heirs of a man's body, or to the heirs male of his body. At common law this was construed to be a fee-simple on condition the grantee had the heirs prescribed. If he died without such heirs the estate reverted to the grantor. If he had such heirs the fee became absolute in him, and he could sell his estate and bar his own issue and prevent a reverter. This right of the grantee was cut off by the statute of Edward I, which prohibited a sale by the grantee, to the detriment of his issue and the grantee's reversioner.

§ 129. **Estates tail.**—This statute converted what before had been a fee-simple estate into an estate in fee tail. This restraint upon the power of alienation fettered inheritances and created perpetuities, which were condemned by Bacon and Coke and other writers. The landed aristocracy opposed all attempts to facilitate sales of land, but the growing spirit of commerce and industry, foiled by the legislature, found

expression in a species of judicial legislation, by which the fiction of a common recovery was allowed to cut off the entail. Common recoveries were fictitious suits, in the nature of pious frauds, allowed by the courts, the object of which was to get rid of the mischievous consequences of the statute of Edward I. If the tenant wished to have his estate tail converted into an absolute fee, he procured himself to be sued by a fictitious person, who claimed that the tenant had no right to the land. The parties to the suit, as the made-up record would show, then compromised the case and a judgment was entered, the result of which was that what was formerly a fee tail estate was converted into an absolute fee with all its incidents. To such awkward shifts, such subtle refinements, says Blackstone, were our ancestors obliged to have recourse in order to get the better of that stubborn statute of Edward I. The design for which these contrivances were set on foot was certainly laudable, the unriveting the fetters of estates tail, which were attended with a legion of mischiefs to the commonwealth, but while we applaud the end we can not admire the means.

§ 130. Estates in fee tail with all their inconveniences existed in this country before the Revolution. They have now become obsolete from disuse or have been abolished or modified by the legislatures of the different states. The general tendency of judicial decision as well as legislation in this country has been in the direction of removing all limitations upon the power of sale of real estate, and preventing perpetuities.

§ 131. **Tenant by the curtesy.**—Where a man marries a woman who is seized during marriage of an estate of inheritance, and has by her issue born alive capable of inheriting the estate, and the wife dies before the husband, he takes an estate for life. This is sometimes called tenancy by the curtesy of England, though the same estate existed in ancient times in other countries. In this country the rule prevails in all the states where that kind of estate has not been abolished by statute. Though it is held that the wife's dower is lost by her adultery, no such conduct on the part of the husband will work a forfeiture of the curtesy.

§ 132. **Dower.**—Dower exists where a man seized of an estate of inheritance dies in the lifetime of his wife. By the common law she was entitled in that case to be endowed of a third of the estate for life. At first it was limited to lands held by the husband at the time of the marriage, but by Magna Charta it was extended to all lands, of which the husband was seized during coverture. This right or estate of dower exists in all of the states where it has not been modified or changed by statute. Dower can not be claimed as against a mortgage given by the husband for unpaid purchase-money. Nor is it necessary for a wife to join with her husband in a mortgage securing the purchase-money. If the wife unites with her husband in conveying his land, releasing her dower therein, her right is extinguished. If a wife joins in a mortgage with her husband, who dies, and upon foreclosure a surplus above the mortgage debt is realized, she may have dower in such surplus, though the husband may have released the

equity of redemption. Dower may be barred in various ways, though the husband by his act alone, without the wife's assent, can not bar it. It may be barred by deed, by the adultery of the wife, by divorce, by jointure, which is a joint estate settled upon husband and wife by which the whole estate goes to her on his death, by an antenuptial contract in which in lieu of dower a sum of money or something else is agreed to be taken in lieu of dower, by a bequest in lieu of dower, if the widow elects to take under the will.

§ 133. **Assignment of dower.**—The widow's dower may be set off or assigned by agreement with the heirs, or by an amicable partition, or by an adversary proceeding in which the court will see that she gets her equitable one-third of the real estate, to which her right of dower has attached.

§ 134. **Estates upon condition.**—Estates upon condition are such as have a qualification annexed to them by which they may upon the happening of a particular event be created, enlarged or destroyed. They are divided into estates upon conditions implied in law, and estates upon conditions express or in deed.

§ 135. **Estates upon condition implied.**—A tenant for life for years is under an implied obligation to refrain from waste or any fraudulent or wrongful act which would injure the freehold. For willful misconduct of this sort, the estate may be forfeited. So a grant to a man of an office has the implied condition annexed to it that he will perform its duties. A corporation holds a franchise under the implied condition that it will fulfill its duties to the pub-

lic, and a violation of its duties by non-user or misuse will work a forfeiture of the estate. It is to be here remarked, however, that it is for the state alone, and not for a private citizen to institute and carry on proceedings for forfeiture of corporate franchises. The state may waive a condition broken as an individual may.

§ 136. **Estates upon condition expressed.**—Where an estate is granted in fee-simple or otherwise, with an express qualification annexed whereby the estate shall commence, be enlarged or defeated upon performance or breach of such qualification or condition, it is an estate upon condition expressed. Conditions are either precedent or subsequent. Precedent conditions must happen or be performed before the estate vests. Subsequent conditions are such which by reason of non-performance defeat the estate already created.

§ 137. **Conditions precedent and subsequent.**—The intention of the parties as it appears in the deed determines whether the condition is precedent or subsequent. A condition precedent which is possible and lawful must be strictly performed. Conditions subsequent which defeat the estate are strictly construed against the grantor. Conditions must be annexed at the time the estate is created; they must operate upon the whole of the estate, though they may be limited to a part of the land. If an estate in fee is granted with a provision that upon the happening of an event the estate shall cease for a number of years, it would not be good. Conditions can only be reserved in favor of the grantor and his heirs. Conditions which are impossible when made,

or become so by the act of God, are void. Unlawful conditions are void. Conditions repugnant to the nature of the estate are not good, as if an estate is given in fee on condition that the grantee will not sell it or enjoy it. Conditions in absolute prevention of marriage are void, though in some states widows who take lands from their deceased husbands coupled with such a condition are bound by the conditions. Conditions may be performed by any one having an interest in the estate. Equity will relieve against forfeitures for breach of conditions when compensation can be made in damages. Where a condition is broken the grantor may bar himself from taking advantage of it, as by taking rent afterwards with knowledge. Mortgages are sometimes treated under the head of estates upon condition. They are so considered yet in some of the states, but in most of them they are treated as mere liens. The common law rule is that the mortgagee takes the title subject to be defeated by payment of the mortgage debt. This rule prevails in most of the older states, but a large majority of the states of the Union, either by statute or the decrees of the courts, treat a mortgage as a mere lien to secure the debt, while the title remains in the mortgagor until default, foreclosure and sale. The methods by which the mortgagor proceeds to enforce his lien after the maturity of the mortgage debt are regulated by the statutes of the different states.

§ 138. **Estates in remainder.**—Estates in remainder were popular in England because they facilitated the creation of family settlements, and often there were several remainders limited upon one another to prevent an estate passing out of the family. Remaind-

ers are not favored in this country, anything tending to obstruct the free sale of land being opposed to the spirit of our people and institutions. Blackstone's definition is concise and comprehensive. "An estate in remainder is an estate limited to take effect and be enjoyed after another estate is determined." It is a vested remainder where there is a person in being who would have an immediate right of possession upon the ceasing of the precedent estate. It is a contingent remainder if the person to whom, or the event upon which it is limited is uncertain. If one holding the fee-simple grants lands to A for twenty years, and then to B and his heirs forever, A is tenant for years, remainder to B in fee. Or there may be a grant to A for years, then to B for life, and then to C and his heirs forever, then A is tenant for years, B for life, with remainder in fee to C. These several estates are parts of one estate, the fee-simple of the grantor out of which the three several estates are carved. It follows, of course, that no remainder can be limited after a grant in fee-simple. There must be a precedent estate created, upon which the remainder is limited, and this precedent estate is called in law the particular estate. It is essential also that the remainder must commence or pass out of the grantor at the time the particular estate was created. The remainder must vest in the grantee during the continuance of the particular estate, or instantly upon its termination. A contingent remainder may never take effect, as where there is a grant to A for life, remainder to B's eldest son (then unborn) in tail. If B has no son when the particular estate is

determined, viz., at the death of A, the remainder is gone.

§ 139. **Rule in Shelley's Case.**—And here is a proper place to consider what is known as the rule in Shelley's Case. It was laid down in the following language in 1 Rep. 104 as follows: "It is a rule of law, where an ancestor by any gift or conveyance takes an estate in freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail, that always in such case *the heirs* are words of limitation of the estate and not words of purchase." Land is acquired in two ways, by descent and purchase. Where one derives title through a deed or will, he is a purchaser. Where it comes to him by virtue of his kinship or relation to an ancestor, he takes by descent. But if by will an estate is given which is the same in quality and quantity as that which would go by descent, it is an estate by descent. The effect of the rule in Shelley's Case was to cut off what would seem to be intended as a remainder limited to the heirs of the grantee, and to make the estate an absolute fee in the grantee. This rule has been generally adopted in this country as a part of the common law, although it has been modified or abolished by statute in some of them.

§ 140. **Executory devises.**—An executory devise of lands is such disposition of them by will that thereby no estate vests at the death of the devisor, but only on some future contingency. Executory devises were created to carry out the purposes of the testator. A devise to a *femme sole* and heirs upon the day of her marriage is a good executory devise.

If she does not marry the estate would go by descent to the heirs of the testator. A devise to A and his heirs, but if he dies before the age of twenty-one years, then to B and his heirs, is good, though if these words were used in a deed the remainder would be void and A would take a fee. Executory devises were abused by making them the means of creating perpetuities. So there is a rule at common law which has been incorporated into the statute law of many states that the utmost length of time that is allowed for the contingency of an executory devise to happen in, is the duration of a life or lives in being and twenty-one years afterwards.

§ 141. **Estates in reversion.**—An estate in reversion is the residue of an estate left in the grantor to commence in possession after the determination of some particular estate granted out by him. It grows out of the legal maxim that whatever a man does not dispose of remains to him and his heirs. It is a present interest, but can only take effect in the future as is implied in the definition above given.

§ 142. **Estates in severalty.**—Estates are now to be considered with respect to the owners thereof, whether in severalty, as tenants in common, or as joint tenants. An estate in severalty is one which has a single owner.

§ 143. **Joint tenancy.**—At common law a joint tenancy was where lands or tenements were granted to two or more persons, to hold in fee-simple, fee tail, for life, for years or at will. In joint tenancies, there must be unity of interest, of title, of time and of possession. One of the incidents of this tenancy at common law was the right of survivorship, by

which on the death of one the entire estate vested in the survivor. In this sense, joint tenancies do not exist in this country, except in the case of conveyances to husband and wife jointly. These are called tenancies by the entirety. No part of such an estate can be sold by one so as to affect the right of survivorship of the other. No part of it can be seized in execution for the debt of either during its continuance, and upon the death of one the whole vests in the survivor. In Ohio the courts have refused to recognize such a tenancy, by holding that husband and wife holding by joint deed or devise are tenants in common, without the right of survivorship.

§ 144. **Tenancy in common.**—A tenancy in common is where there are several owners who may hold by different title, in different interests, which may be acquired at different times, the only unity being unity of possession.

Tenants in common may have partition of the lands. They may sue one another for waste. The possession of one is the possession of all. If one receives all the rent, or more than his share, he is liable to the other tenants for the excess. They are liable for their proportionate share of the expense for repairs, for taxes, and for insurance. Tenants in common must act in good faith towards each other. One can not buy in the estate for himself at a delinquent tax sale. If one buys in an outstanding title which threatens the estate, he can not claim this in his own right, to the prejudice of his co-tenants, if they are willing to pay their share of the purchase-money.

CHAPTER XII.

TITLE TO REAL PROPERTY, HOW ACQUIRED.

§ 145. **Ways of acquiring title.**—Title or ownership of real property may be acquired by occupancy or possession when it continues long enough to ripen into a perfect title, by marriage, by devise, by descent, by contract.

§ 146. **Title by occupancy.**—Mere possession or occupancy is the lowest form of title, but it is good in the occupant against the world until some one shows a better title, but any show of right in a claimant would be good as against a mere intruder. As we have seen, property without an owner belongs to the first one who takes possession of it. This right, which was so important at the time of the early settlements on this continent, is of little value now that most of our public domain has been disposed of. Its assertion by the European nations, who are extending what they choose to call their "spheres of influence" in Africa, bids fair to result in serious complications and wars such as grew up here in the last century between France and England. Where two claim by possessory titles, one being in present possession and the other having had prior possession, it is the rule in England and America that proof of prior possession is presumptive evidence of title and will prevail over the claims of the more recent occupant. It is

not necessary in such a case that the prior possession should have continued for twenty years. The statutes of limitations usually provide that no action for the recovery of the title or possession of real estate shall be maintained after twenty years from the time the cause of action accrued, unless the person entitled to such action was under the disabilities of infancy, coverture, insanity, or imprisonment. Special periods of limitations are fixed by the statutes of different states and they are constantly undergoing modification.

§ 147. **Adverse possession.**—In order to make possession for the statutory period of limitations a bar to an action, the possession must be adverse. Adverse possession is a possession inconsistent with the right of the true owner; in other words, where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than as owner—that is, with the intention of excluding all persons from it, including the rightful owner—he is in adverse possession of it. Thus, if A is in possession of a field of B's, he is in adverse possession of it, unless there is something to show that his possession is consistent with a recognition of B's title. Adverse possession depends upon the intention with which it is taken and held. Where there is an unintentional encroachment on the land of another, as where a man thinking he is building on his own line by mistake puts part of the structure over the line, such possession is not adverse. The possession must be hostile or adverse, actual, visible, notorious, exclusive, continuous and under claim of title.

§ 148. **Occupying claimant.**—It sometimes happens that one has a claim of title, and thinking it good enters upon land of another and makes valuable improvements on it. In such a case the occupant may, under the occupying claimant's statutes, which have been enacted in most of the states, file his complaint and have his improvements and the land appraised separately, and the owner is then given the option to take possession upon his paying the claimant the appraised value of the improvements and the taxes paid, with interest, deducting the value of the rents and profits and the damages assessed against the occupant for waste or other causes. If the owner fails to make his election, the occupant may remain in possession upon paying the value of the land aside from the improvements. This is not a common law right, but is purely statutory.

§ 149. **Title by marriage.**—Title by marriage or by dower and curtesy we have already considered.

§ 150. **Title by descent.**—Where a man dies intestate being the owner of lands, the law disposes of the property by transferring the title to those who by virtue of the law of the place where the land lies are his heirs. The title the heirs take is a title by descent, and the person from whom the estate descends is called in law the ancestor. The statutes of descent vary in the different states according to the wishes of the citizens as expressed in legislation, as in some states, where those of the whole blood of the ancestor are preferred to those of the half blood, etc. Those who take land by descent take it charged with its burdens; these may be in the form of mortgage

or other lien created by the ancestor, or in the form of a general indebtedness, which, so far as it is in excess of the personal estate of the ancestor, is a charge upon the real estate. Personal property left by an ancestor also descends to his heirs, but with this difference, the line of descent as to personal property is fixed by the laws of the place where the ancestor resided at the time of his death, not where he happened to be, but the place of his fixed residence; while the line of descent as to his land is governed by the law of the place where it lies. Where heirs are of one class, as sons or daughters, they take equally, share and share alike, but if there are children and grandchildren, the children take a full share each, and each set of grandchildren take what their parent would have taken if living. But in some states, as in Indiana, if there are grandchildren only left as heirs, the estate is divided equally amongst them all. Illegitimate children may inherit from their mothers alone, unless by adoption, according to rules prescribed for such proceedings, they are legitimized by the father.

§ 151. This is not the place to give the rules of descent as they prevail in all the states. It is believed, however, that the following are of general application. Where heirs take by descent, they take as tenants in common. Posthumous children may inherit. Bastards may inherit from and transmit inheritance to the mother. Children born before marriage and acknowledged after, are legitimate and may inherit. Males are not preferred to females.

§ 152. **Title by devise.**—Title by devise is where

the ownership of land is transferred by will. Such a transfer of land is called a devise. The person who takes it is a devisee. The person who dies and leaves a will is a testator, and the person named in the will and charged with the duty of carrying out its provisions is an executor.

§ 153. Wills.—Wills are of great antiquity, and it is said by some writers that it is impossible to find evidence of any time in human history when they did not exist in some form, though Sir Henry Maine maintains that they probably did not exist among the barbarians before their invasion of the Roman Empire. He further says that to the Romans belongs pre-eminently the credit of inventing the modern will, the institution of which, next to the contract, has exercised the greatest influence in transforming human society.

§ 154. There is no general law of the United States on the subject of wills, each state having its own laws as they find expression in the decisions of the state courts, or in statutory enactments. Who may make a will is the first question. Generally all persons of full age and sound mind are capable, though in some states married women are deprived of the right. The capacity to make a will must exist when it is made, and subsequent incapacity will not invalidate it. Whether the testator possessed the requisite capacity is a question of fact for the jury—the interpretation of the will, the power to declare its meaning, is for the court. Ordinarily, a will must be reduced to writing and must be subscribed by the testator in the presence of attesting witnesses, who shall also subscribe the same in the

testator's presence and at his request. Nuncupative or verbal wills may be made by which personal property can be disposed of, and the manner of making and proving such wills, as well as the amount of property so disposable, is controlled by statute. After a will is made, it is common for the testator to add to the original will certain modifications of it. These must be reduced to writing, and be attested in like manner as the original will. Such modifications are called codicils.

§ 155. A will may be revoked in several ways. The making of a new will revokes all prior wills. The testator may revoke his will by mutilating or destroying it with the intent to revoke it, or such mutilation or destruction may be done by any one at the request of the testator. The subsequent sale of land devised by a will revokes the will as to that land. The testator may revoke the will by a writing, subscribed and attested like a will, in which his intention to revoke it is clearly expressed. A will is sometimes revoked by operation of law, as when a child, unprovided for in the will, is subsequently born.

§ 156. Wills relating to land must be executed and attested according to the forms required by the law of the place where the land lies. Wills disposing of personal property must be executed according to the laws of the place where the testator resided at the time of his death. The provisions of wills executed and proved in a foreign country or another state may be enforced wherever property is found belonging to the testator, and disposed of by the will, upon producing and placing of record a copy of the will and a duly certified copy of the proceedings by

which the will was admitted to probate. The methods of proving and enforcing the provisions of such wills are regulated by statute.

§ 157. A will may be set aside in a suit brought for that purpose by any party in interest, when it is proved that the will was unduly executed, that its execution was procured by fraud or duress, or that the testator did not possess the legal capacity to make a will.

§ 158. **Title by purchase.**—The cumbersome methods of transferring title to real estate which were customary under the common law of England have never prevailed in this country, though in some localities there are useless intricacies and mysteries in the forms of conveyance which were invented and are perpetuated by scriveners and lawyers for their own profit and at great expense to their clients. Since real estate has become a commodity, and has lost in public estimation much of that fictitious dignity with which it was clothed by the common law, the forms of buying and selling and conveying it have been much simplified. Title bonds, quitclaim and warranty deeds are about the only instruments necessary to carry out the intention of the parties. A title bond is an agreement signed by the seller agreeing to convey to the buyer, for a stipulated price to be paid, certain land described in the instrument. A quitclaim deed is a form of conveyance in which the grantor conveys to the grantee, his heirs and assigns, all the grantor's present interest in land. A warranty deed is a form of conveyance by which the grantor conveys land to the grantee, his heirs and assigns, with an agreement expressed in the deed

that the grantor will warrant and defend the title against all persons, and against all incumbrances. The form may be varied when the warranty is not general, but special, and where certain incumbrances are assumed by the grantee. By special clauses incorporated in the deed the exact meaning of the parties as to what interest is conveyed and what liens are assumed may be expressed. To make a deed effective to pass title, it must be executed in due form and be delivered to the grantee, or to some one for him. To make the delivery effective the grantor must relinquish all control over the instrument. If, after it is executed, it is put in the hands of a third person, to be by him delivered upon the performance of some act or the happening of some contingency, the instrument is, until the act is performed or the contingency happens, an escrow and not a deed.

§ 159. **Title bond.**—The title bond, as we have seen, is a sale of land with an agreement to convey. It must be in writing because by the statute of frauds no action can be maintained on an agreement for the sale of lands or any interest therein, unless the agreement, or some memorandum thereof, is in writing, and signed by the person to be charged thereby, or by some one authorized to sign it for him. Such a bond only gives an equitable estate, even where the purchase-money is all paid, but a court of equity upon proof of payment will compel the seller to make a deed according to his agreement, and the same relief will be given against the heirs of the seller.

§ 160. **Deeds by owners not in possession.**—At

common law the conveyance of land, which at the time of the conveyance was in the adverse possession of another, was void, but this rule of the common law has been abrogated by the laws of many states, although in some of them it is still recognized. The reason for the rule was that the right to make such conveyances tended to encourage litigation, and because, as Coke says, "under color thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed." Conveyances of land pending suit involving the title thereto are void, except in states where by statutory enactment they are recognized as valid.

§ 161. **Forms of deeds.**—What form is necessary and what formalities in its execution are requisite to give validity to a deed, depends upon the statutes of the state where the land lies.

§ 162. **Registration of deeds.**—A deed after its execution and delivery should be recorded promptly. A delay in recording it beyond the time fixed by statute will make the deed void as to subsequent purchasers in good faith without notice of the existence of the unrecorded deed. All sales of interests in land, except leases for short terms specified by statute, must be in writing and should be recorded. To entitle such instruments to be recorded, they must be acknowledged before some officer authorized to take such acknowledgment.

§ 163. **Parties to deeds.**—The parties to a deed, especially the grantors, must be capable under the law of making such contracts. If it is intended to convey the interest of the husband and to bar the wife's right of dower, she must join in the deed with

her husband, and under the laws of some of the states she must be examined by the officer taking the acknowledgment, separate and apart from her husband, to see that her uniting in the deed is her free and voluntary act. A husband may execute a valid conveyance of his lands without his wife joining in the deed, but the grantee takes subject to the wife's right of dower, and if she survives her husband, she can have her dower assigned to her out of the land. A wife's deed of her own land, without her husband joining, is, in most states, void.

§ 164. **Guardian's deeds.**—A guardian can only convey his infant's land when authorized to do so by a court having jurisdiction. The deed of an infant is voidable, and may be ratified or disaffirmed by the infant, on arriving at full age. Lands of idiots and lunatics can only be conveyed by guardians, under authority of the court.

§ 165. **Deeds of partners.**—Real estate owned by a partnership for partnership purposes can be transferred by a conveyance in which all the partners should unite as grantors. If it is desired that one should act for all, his authority should be evidenced by a power of attorney executed by his copartners. And while it is not, as a rule, necessary to have the wives of the partners join their husbands in such conveyances, it is the safer practice to have them do so.

§ 166. **Deeds of corporations.**—Corporations, if by their charters they may hold real estate, may convey the same, under the corporate seal and by the officer designated in the laws of the corporation to sign the deed in its name.

§ 167. **Powers of attorney.**—A person holding a power of attorney for the purpose should not, when conveying land, affix his own name, but the name of the principal to the conveyance. Powers of attorney authorizing the conveyance of real estate should be signed and acknowledged and recorded, so that purchasers dealing with the attorneys may know the extent of their powers.

§ 168. **Deeds by officers.**—Sheriffs, master commissioners, and others appointed by the court, in making deeds should strictly pursue the statute and the decrees of the court authorizing the conveyance. A sheriff's deed executed according to law need not be submitted to the court for its approval, but commissioners, guardians, executors and others who make what are called judicial sales, should report them to the court with a form of conveyance for the approval of the court. Lands are conveyed by auditors or other officers where they have been sold for delinquent taxes. Titles acquired by means of tax sales are, if not regarded with suspicion, carefully scrutinized, and any irregularity in the levy of taxes or sale will vitiate the deed.

§ 169. **Description of land conveyed.**—The land should be so described in a deed or agreement for sale that a stranger, without the aid of outside evidence, can go upon the premises and identify them. In states where the public lands have been surveyed in sections and sectional subdivisions, it is sufficient to describe the land as being section No. —, township —, range —, in —— county and —— state. Where the land is described by metes and bounds the lines,

courses, corners and distances should be accurately followed.

§ 170. **Title by eminent domain.**—All private ownership of land is held subject to the state in which it lies, and there resides in the state the power to resume possession and ownership of it, whenever the public good requires it. This power has its limits fixed by the constitutions of the United States and of the several states, which provide that private property shall not be taken for public use without just compensation. Where it is desired to appropriate land for the purpose of establishing navy yards, arsenals, or for sites for post-office buildings, custom houses and the like, the government, if it can not secure desirable property by purchase, institutes by its proper officers proceedings in the proper courts within whose jurisdiction the land lies, to have the value of the land ascertained. Upon payment of the amount so ascertained, the title vests in the government. This right to appropriate private property for the public use is called the right of eminent domain.

§ 171. This right of eminent domain is exercised in another way when private individuals for their own profit embark in enterprises which perform some public service. It can only be exercised where the property is taken for a public use, and where the property condemned is necessary to enable the public use to be carried into effect. It is also a condition that compensation must be made to the owner, and it is generally held that payment must be made before entry. Cities and towns take property for streets and parks ; railroad, turnpike, telegraph, telephone, canal, ferry, gas, water, and irrigation companies,

condemn land for right of way, and exercise this right when authorized to do so by the legislature, with whom rests the power to determine the manner in which, and purposes for which, it may be exercised.

§ 172. The proceedings by which property may be taken and appropriated for the purposes named in the preceding section are regulated by statute, and in this matter there is substantial uniformity in the laws of the several states. The corporation desiring to exercise the right may file in the proper court an instrument of appropriation, setting forth the uses to which the property is to be devoted, giving an accurate description of the property intended to be appropriated, and setting out the names of the owners and persons interested in it. The proceedings may be summary, as in some states, where the law does not give the right of trial by jury, or they may be in the form of a civil action, in which the right to a trial by jury is given. Proceedings in the exercise of the right of eminent domain are not "suits at common law," for which "the right of trial by jury shall be preserved," as required by the constitution. In either case the jury or commissioners selected hear evidence, view the premises and report to the court their finding as to the amount of damages to be paid to the land-owners. When the report is confirmed by the court, the party seeking the appropriation may pay the money into court, and enter upon the property. If either party is dissatisfied with the report, an appeal may usually be taken from the award. As the proceedings are purely statutory, the provisions of the statute regulating them must be

strictly followed. Judgments in such cases have the same binding effect as ordinary judgments, and they can not be collaterally impeached.

§ 173. **Title by escheat.**—Where a person died intestate in England without lawful heirs the title to his real property went back to the original grantor, or lord of the fee, from whom it proceeded. In this country when a man dies intestate and without heirs, the title to his real property reverts or escheats to the people, as forming part of the common stock of the community, it being a fundamental principle that, if the ownership of property becomes vacant, the right must necessarily subside into the whole community in whom it was vested at the origin of society. This rule, which formerly applied to real property only, is extended by the laws of most of the states to personal property.

§ 174. **Title by forfeiture.**—Title by forfeiture is a title which the state acquires to the property of a felon who, with his heirs, devisees and legatees, are deprived of it on account of, and as a punishment for, high crimes. Such forfeitures are by the constitutions of many states prohibited. Conditional estates in chattels and real property may be forfeited by breach of conditions, and the misuse of a chattel by a person having a qualified interest therein will sometimes determine his estate in favor of the absolute owner.

CHAPTER XIII.

PERSONAL PROPERTY.

§ 175. **Definition.**—Personal property embraces all objects and rights which are capable of ownership, except real estate or some interest therein.

§ 176. **Title to—How acquired.**—The title to personal property may be acquired in various ways. (1) By occupancy, as where one finds or takes possession of an article which has no owner or which has been abandoned, or where one captures wild animals, or fish, or finds a jewel to which no one claims title. (2) By increase or accession, as where one owns animals who have young. (3) By confusion, as where one has goods or property, like wheat, and some one wrongfully mixes his property of the same kind with it, so that it can not be distinguished and separated. (4) By gift, as where the owner of an article delivers it to one with the intent to pass the title to the donee. (5) By a written transfer describing the property and the person to whom it is transferred. (6) By sale by the owner, with or without delivery of possession. (7) By succession or descent from one who dies intestate. (8) By bequest contained in a will. (9) By operation of law or judgment, as where one is sued for the conversion of another's property and judgment is rendered against the defendant for its value; in such cases, upon pay-

ment or satisfaction of the judgment so rendered the title to the property vests in the defendant. So the title to the personal property of one dying testate or intestate vests in the executor or administrator by mere force of law. So a qualified title to the personal property of a ward vests in the guardian, and the assignee of a bankrupt and a receiver appointed by the court have a title to the goods which come to their possession in the administration of these trusts. (10) Title to personal property may be acquired also by purchase at a sale by an executor, administrator, guardian, assignee in bankruptcy, trustee, sheriff or other officer who, by law or the decree of a court, has authority to make such sale.

§ 177. **Burial rights.**—At common law there could be no ownership of the bodies of the dead, but in some states the law has been modified and some of the rules of property have been applied. In such states the bodies belong to the surviving relatives in the order of inheritance, and they have the right to control the disposition thereof. There would be a right of action against one who robs the grave or desecrates the body. The real injury in such case would not be to the grave or body, but to the feelings of the survivors, and the law recognizes such injury as a legitimate basis for recovery of damages.

CHAPTER XIV.

DECEDENTS' ESTATES.

§ 178. **Testator and intestate.**—A person dying without making a will is called an intestate, and one who makes and leaves a will is called a testator.

§ 179. **Statutes of descent and distribution.**—The personal property of an intestate is distributed to his heirs, according to the statutes of the states where the intestate lived at the time of his death, and his real estate descends to his heirs, according to the laws of the place where the real estate was situate.

§ 180. **Administrator.**—Upon the death of an intestate, an administrator is appointed, whose duty it is to take possession of all the personal property, convert it into money, pay the debts, and to distribute what remains amongst the heirs. The administrator has no right to meddle with the real estate of the decedent, unless the proceeds of the personal estate should prove insufficient to discharge the debts, in which case, upon proper application to the court having probate jurisdiction, he will be authorized to sell under the direction of the court so much of the real estate as will discharge the debts. The right to administer is generally first in the surviving husband or wife, next in the children, according to age and capacity, next to the largest creditor, and if none of them desire to accept the trust, the court will

appoint some competent person. When appointed, the administrator is required to take an oath and give a bond for the faithful performance of the duties of his trust. He is at all times under the direction and control of the court, to whom he is required to report all his doings in the management of the property which comes to his hands. When he is ready to close the estate, he files his final accounts, and if no objections are made by the parties in interest, he is discharged. If an administrator dies, resigns, or is removed, the court appoints a successor, who is called an administrator *de bonis non*, and his duty is, as the name implies, to administer so much of the estate as was left unsettled by his predecessor. The authority issued by the court under its seal to an administrator is called letters of administration.

§ 181. **Executor.**—An executor named in a will is the person appointed by the testator to carry out his purpose as expressed in the will. It is usual for the executor to give bond and take an oath, though the giving of the bond is sometimes dispensed with where the testator in his will indicates a desire to that effect, and no objection is made by the parties in interest. The authority issued to an executor is called letters testamentary. It is the duty of the executor to carry out the wishes of the testator in the distribution of such articles of personal property as are disposed of by the will. The gift of personal property by will is termed a bequest or legacy, and the person to whom it is given is called a legatee; the gift of real property by will is termed a devise and the person receiving it is termed a devisee. If the executor has cause to fear that the property of the

testator will not be sufficient to discharge the debts of the estate and to pay the legacies, he may require the legatee to give bond that, in case such deficiency should occur, he will refund to the estate so much as may be necessary to pay his share of such deficiency. The devisees take the real estate according to the terms of the will as soon as the will is admitted to probate, subject to the debts remaining after the personal estate is exhausted. The executor, as the administrator, does not meddle with the real estate of the testator unless it is shown to the court that it is necessary to sell a portion of it to pay debts. The reports and accounts of the executor are made and disposed of in the same way as the reports and accounts of the administrator. If the person named as executor renounces the trust the court appoints an administrator as in the case of an intestate, and the administrator is called administrator with the will annexed, and if this administrator dies, resigns or is removed, a successor is appointed who is called an administrator *de bonis non* with the will annexed. Executors and administrators receive such compensation as the court may allow, or as may be provided for in the will.

CHAPTER XV.

CONTRACTS IN GENERAL.

§ 182. **Growth of right to contract.**—In primitive societies, and under the ancient laws, the rights and liabilities of persons, so far as they had rights and liabilities, were largely fixed and determined by their stations in life, whether as lord or vassal, husband or wife, parent or child, master or slave. The individual, unless he were lord, master or head of a family, had little or no voice in fixing his rights and obligations. Status, a word which is used to designate the personal condition of the individual under these old laws, has been gradually succeeded and almost supplanted by conditions which are the immediate or remote result of agreement, and the great movement of the progress in society has been a movement from status to contract. Societies are civilized and progressive to the extent that the individual can for himself establish such relations as he chooses, work for whom he pleases, and for what he pleases, buy and sell what and where he can, having no superior to control his will or direct his action, except so far as the necessary restraints of public law impose limits upon such action.

§ 183. A large portion of the field of jurisprudence is devoted to the subject of contracts. Contracts from their very nature imply that men are disposed in

good faith to keep agreements which they have entered into voluntarily. And the multiplication of the different forms of contract indicates in a marked manner how the confidence and faith of man in his fellow-man have increased. Society is shocked by the great frauds which are sometimes perpetrated by cunning and powerful men, but the great current of commercial and business life is pure. Men as a rule are faithful in the performance of their agreements. Where men from an honest misunderstanding as to their rights under their contracts or from a dishonest motive to evade them disagree, the aid of the law is invoked to settle the controversy. Some idea of the immense stride society has made may be formed from the language of Sir Henry Maine, who says, "The only form of dishonesty treated of in the most ancient Roman law is theft. At the moment at which I write (1861) the newest chapter in the English criminal law is one which attempts to prescribe punishment for the frauds of trustees." Without dwelling further upon this interesting branch of the subject, we will now proceed to a consideration of the law of contracts as it exists at present.

§ 184. **Contract defined.**—First as to what constitutes a contract. Blackstone's definition is as follows: "A contract is an agreement upon sufficient consideration to do or not to do a particular thing," which is concise and comprehensive. Judge Metcalf preferred the definition of Chief Justice Marshall, as it is given in Sturges *v.* Crowningshield, 4 Wheat. 197. It is in these words: "A contract is an agreement in which a party undertakes to do or not to do a particular thing." In this definition the element of

consideration is omitted. The efforts to improve upon these definitions by later learned writers show a great deal of ingenuity and a large command of words, but it is questionable whether their efforts to make things clear have not tended rather to darken counsel. For the student who is trying to master the elementary principles of the law, the definitions of Blackstone and Marshall will be quite sufficient. Chancellor Kent approved Blackstone's definition substantially as we have given it.

§ 185. **Capacity of parties.**—It is essential to the validity of a contract that the parties should have the capacity to contract; they must be of sound mind, of adequate age and under no legal disability. The following persons are incapacitated: Insane persons, drunkards, infants, persons under duress, and alien enemies during war. In some of the states married women are still incapacitated from making contracts, but these harsh rules are yielding to the demands of an enlightened public opinion, which insists upon enlarging the sphere of woman's rights and increasing her control over her own property.

§ 186. **Void and voidable contracts.**—The terms void and voidable are often confused. A contract is void when its terms are so uncertain that it can not be enforced, or where there is a total lack of capacity in one or both of the parties, or where the contract is illegal, being in contravention of some positive law forbidding it; to these are to be added contracts to refrain from doing what the law requires, contracts which are impossible of performance, contracts based upon an immoral consideration, and contracts contrary to public policy. Contracts legal

in part and illegal in part will be enforced as to the legal part if it can be separated from the illegal; if not, the whole contract is void. Voidable contracts are those which are procured by fraud or duress, or those entered into by persons under disability, such as infants and insane persons. Such contracts may be ratified, but contracts which are absolutely void are incapable of ratification.

§ 187. **Contracts are executory or executed.**—A contract to do a thing, followed by immediate performance, is executed; a contract to do something in the future where instant performance is not expected is executory. If one fails to perform an executory contract, performance may be enforced or damages given to the injured party for non-performance.

§ 188. **Written contracts.**—A written contract is an instrument fixing the rights and obligations of the contracting parties, concerning the subject-matter of the contract, and signed by them or one of them. It is sufficient if it be signed by one and accepted by the other. The party accepting a written agreement is bound by all its stipulations for and against him. As where a deed is delivered by the grantor and accepted by the grantee, the grantor does not sign the deed, but if it contains covenants which are to be performed by him, as for the payment of an incumbrance or the like, he is bound to perform the covenant as much as if he had signed the deed. A written contract may consist of letters or telegrams. It may be written upon several papers at the same time, and if these several papers relate to the subject-matter of the agreement they will be taken as a part of it.

§ 189. **Parol contracts.**—A parol contract is where the agreement of the parties rests in spoken words only, or partly in writing and partly in spoken words. Parol contracts are valid and enforceable, except where by express law they are required to be in writing. By the rules of common law all contracts not under seal were called simple or parol contracts. But the rules which gave a higher dignity to contracts under seal have been virtually abrogated in this country by usage and by statutes. In most of the states the use of seals is now regulated by statute, the effect of which has been to modify or entirely change the common law usage in regard to seals. In some instances the distinction between sealed and unsealed instruments is done away with in terms, while in others the same result is accomplished by abolishing the use of seals except by public officials and corporations.

§ 190. **Express contracts.**—An express contract is one in which the meaning is stated in plain words, which are mutually understood by the parties in the same way.

§ 191. **Meeting of minds.**—In all express contracts, the agreement of the minds of the parties as to the subject-matter of the contract and as to the obligations assumed by each party must appear. If there is a misunderstanding as to the thing contracted for, or as to the time or place of performance, as to the price to be paid, or any other essential matter, there is no agreement, and consequently no binding contract. As if A, having in mind one of several horses in his field, says to B, who has in mind another horse in the same field, "I will sell you the horse for one hundred dollars," and B says, "I will take it

at that price," here is no contract, for the minds of the parties have not met and agreed upon the same thing. So, if A says, I will sell an article, naming it, for one hundred and sixty-five dollars, and B, supposing that the sum named was only sixty-five dollars, agrees to pay it, it is plain that there is no agreement. These are simple forms of illustration, and they could be multiplied indefinitely.

§ 192. **Time of contract.**—Questions arise as to the particular time when the agreement is to be considered as closed, and the rights and obligations of the parties fixed. The general rule is that whenever the minds of the parties meet in agreement as to all the particulars of the transaction, the contract is made and binding. Where the contract consists of correspondence, it is considered as closed and binding whenever there is an offer on the one hand and an acceptance on the other. The acceptance must be without qualification, for if it is qualified or conditional, it is not final, and the matter still rests in negotiation. Where a letter containing an offer is transmitted by mail, and an answer accepting the offer in its precise terms is mailed also, the contract is closed and the rights of the parties fixed, at the instant the letter of acceptance, properly addressed, is deposited in the post-office. There has been much controversy on this point, some writers maintaining that the contract is not complete until the letter of acceptance has been received by the person who made the offer, but the weight of authority supports the view already expressed.

§ 193. **Implied contracts.**—An implied contract is one in which the conduct of the parties is such that

the jury may infer that the parties did intend to make a contract. The customer who takes up a merchant's goods, the master who takes a servant into his employ, in the one case there is an implied contract on the part of the customer to pay to the merchant the reasonable value of the goods, and in the other case there is an implied contract on the part of the employer to pay the employe the reasonable value of his labor. If parties have an accounting, and have agreed upon the balance due, there is an implied contract that the debtor will pay the balance. So there is an implied contract by the borrower to repay borrowed money.

There is a class of cases in which the law implies a contract obligation, regardless of the intention of the parties; as where one procures the goods or money of another, through fraud or mistake, the law implies an obligation to return or pay. These are sometimes called *quasi-contracts*.

§ 194. **Contracts of record.**—Where a judgment is entered in a court of record, it is called a contract of record, on the theory that every man agrees to obey the laws of the land, and where he is adjudged to owe a sum of money by the law there is an implied promise on his part to pay it. Where a man appears in court, and either on his own behalf or as surety for another, enters into a recognizance conditioned for the payment of a sum of money, in case of the failure of himself or his principal to appear in court at a time named, it is a contract of record. Infants may enter into recognizances which will be binding on them and their estates.

CHAPTER XVI.

PARTIES TO CONTRACTS.

§ 195. **Who may make valid contracts.**—Generally all persons and corporations not disqualified by law. And even infants and lunatics, who are under a general disability to assume obligations that may be enforced against them, may become bound to pay for the necessaries of life which may be supplied for their support. Sovereign states may enter contracts, but such contracts can not be enforced against them by suit without their consent. Soon after the adoption of the constitution of the United States it was decided that a private citizen could sue a state without its consent, but the constitution was amended so as to prohibit the bringing of such suits. Where one state of the Union has a claim against another state, she may sue upon it in the Supreme Court of the United States, which has exclusive jurisdiction of such controversies. Foreign states may make contracts and enforce them by suit in our courts. So aliens residing or trading here have the same right to make contracts and sue upon them as citizens, unless the right is restricted by treaty stipulations between their government and ours; in some states, however, they may not acquire title to land. An alien enemy, that is, a citizen of a nation with which we are at war, can make no contract

or acquire any rights during war, unless by treaty between the belligerent powers the right is given. He may be sued on existing contracts, and unless a contract existing at the time of the war is of such a character that it is continuing in its nature, war will not destroy it. Where persons engaged in certain callings are required to have a license to carry on their avocations, the statutes of some states make their contracts void, unless they have such license.

§ 196. **Infants.**—An infant is a person under twenty-one years of age, and while under that age he can make no binding contract except in the following cases, viz.: (1) For necessaries. (2) Contracts entered into by authority of law, as in the case of a recognizance in his own behalf. (3) Contracts created by law, as where an infant marries he is bound to support his wife. According to the weight of authority he is not bound by a contract under which he has received something of value which he can not return. His other contracts are voidable; that is, the infant may ratify, perform or repudiate them at his option. An infant where his father has emancipated him, by relinquishing his custody and refusing to maintain him, may receive his own earnings, but it does not enlarge his capacity to make contracts.

§ 197. **Infant's contracts for necessaries.**—What are the necessaries for the payment of which an infant may bind himself by contract? They include clothing, food, medical aid, and education, and these must comport in quantity and quality with the infant's station in life. If he have a wife and children he is chargeable with necessaries supplied to

them. An infant is not bound by the terms of his contract to pay for necessaries beyond a reasonable price for the articles.

§ 198. **Fraud of infants.**—If an infant procures goods of a tradesman on a false statement that he was of age the goods can be reclaimed on the ground of fraud. Sometimes courts of equity hold an infant to a contract that he has entered into under a false pretense as to his age. "The privilege of infancy is a shield for his protection and is not to be used as a weapon of injustice."

§ 199. An infant may be bound by an executed contract in a matter where he would not be bound if it was executory. If an infant were to buy a thing, not being necessaries, he could not be compelled to pay for it, but having paid for it he could not keep it and also recover back the money. If he has put money into a partnership, and has performed services in the business, he can not on rescinding the agreement get back his money and pay for his labor, too. The privilege of infancy is personal, and can only be pleaded by the infant himself; except that if he dies or becomes insane, his heirs, administrator or guardian may avoid his contracts.

§ 200. An infant may disaffirm his contract during minority. If he retains the thing contracted for after he arrives at full age, it is a ratification of the contract. So, if he conveys land after his majority, which he purchased during his infancy, it is an affirmance. And if he has conveyed land during his infancy, and in his majority conveys the same land to another, the latter deed disaffirms the former. Where he elects to disaffirm, he must disaffirm the

whole contract. There can be no ratification of a voidable contract during infancy, for the ratification would be voidable. Retaining after he arrives at majority either goods or land purchased during his infancy makes the contract valid. Some states by their statutes require that a binding ratification of a contract made by an infant can only be made in writing.

§ 201. Contracts made by persons under duress are not binding. Duress exists where one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of his free will. There may be duress of the person, as by threats, imprisonment, or an exhibition of apparently irresistible force, or of the goods, where one is compelled to submit to an illegal exaction to obtain possession of them. The imprisonment must be unlawful in itself, or if lawful it must be enforced in a cruel and oppressive manner. The threat or threats must be such as to excite fear of some grievous wrong, and such as would overcome the will of a person of ordinary courage. Where a contract is obtained by duress, it is incumbent upon the person who wishes to avoid the contract on that account to proceed without delay. If after the duress he does any act in ratification of the contract, he is cut off from his defense.

§ 202. Insane persons.—As a rule, the contracts of persons of unsound mind are not binding upon them. Unsoundness of mind, as here considered, is such a lack of mental capacity as totally unfits one for the care of his own interests. Of persons of sound mind the law takes no note of the grades of mental capacity between the highest and the lowest.

When, however, from disease or any other cause the individual is or has become of unsound mind, as above indicated, he will not be held to his contracts, and those who deal with him do so at their peril. One who has been put under guardianship as a person of unsound mind is conclusively presumed to be so, and his estate can only be lawfully dealt with by his legally appointed guardian, who acts for him under the direction of the court. As to a person who has not been adjudged to be of unsound mind, the question of his mental capacity, when it is in issue, is to be tried as any other question of fact, the presumption in such cases being that every person is sane until the contrary is shown. It is not necessary here to go into a discussion of the different forms of insanity. We are here concerned only with that class of persons who in law are considered to be incapable of making valid contracts. Even a person of unsound mind may in exceptional cases, as an infant may, make binding contracts, viz., for necessaries suitable to his condition in life, and he will be held to his contract where he has dealt with one who in good faith supposed him to be sane, and has performed the contract by paying the consideration to him, if the consideration can not be restored.

§ 203. **Drunkenness.**—Where a person is so drunk at the time he makes a contract that he does not understand what he is doing, such contract is voidable, and may be repudiated or ratified by him when he becomes sober. The same exceptions hold good here as in the case of infants and persons of unsound mind. A man when he gets sober can not hold on

to the benefits of a contract made when he was drunk, and repudiate the contract also. A drunken man, as an infant and lunatic, may make a valid contract for necessaries. Slight circumstances will be sufficient to ratify the contract of a drunken man. A delay in disaffirming it if unreasonable, or retaining the benefit after he becomes sober, will be a sufficient ratification.

§ 204. **Married women.**—By the common law married women could not make valid contracts. The extension of the rights of women in most of the states of the Union has practically emancipated them from the restraints of the common law. In the two states of Wyoming and Colorado women have the right of suffrage equal with men. In Kansas they vote at municipal elections. In other states they vote on questions concerning local school management, and in nearly all the states they have the control and management of their separate estates, and as to such matters the married woman is put upon an equal footing with an unmarried woman, or with her husband. Nearly every session of our state legislatures witnesses some innovation upon the rules of law which have restrained her liberty in dealing with her property. So that it would be foolish here to attempt to state the extent or limitations upon the powers of married women in the matter of contracts. To ascertain what these are recourse must be had to the statute laws of the several states.

§ 205. **Corporations.**—The power of a corporation to make contracts is limited by the charter creating it, or, where it is organized under a general law, by the terms of that law. A contract entered into by a

corporation beyond the power so conferred is void. It is manifest that a corporation, being an artificial person, can only contract by and through its agents, and the powers of these agents are determined by the laws of the state, or the articles and by-laws of the corporation, or they may be implied from the nature and functions of the officer or agent who acts for the corporation. It was an old rule of law that a corporation could only contract under its corporate seal, but the necessities of commerce have led to an abrogation of the rule, so now it may be said that within its powers to make contracts it may make them in any manner that a partnership or natural person may. It has been said that a contract of a corporation not within its charter or lawful powers is void, but this must be understood with the equitable qualification that where such contract has been executed so that the corporation has received the consideration, and is unwilling or unable to return it, it will not be heard to deny the validity of the contract. If it would rescind, it must first do equity.

§ 206. **Contracts by agents.**—Individuals and corporations are bound by contracts made in their behalf by their authorized agents. The necessities of commerce demand that most of the business of the world be done through agents. Any one capable of acting for himself may be an agent; a minor of sufficient capacity may be an agent and make contracts which will bind his principal. The relation of principal and agent may be created by writing, by parol, or it may be implied from circumstances. An agent can not assume incompatible duties; he can not be agent of buyer and seller at the same time, unless by consent

of both principals, nor can he be employed to do an unlawful act, nor to act in place of another in a matter of personal trust. An attorney, an author, an artist, a physician, whose personal skill is engaged, can not substitute an agent to do his work. So generally an agent can not employ a substitute, unless expressly or impliedly authorized to do so. When, however, the nature of the employment and the magnitude and character of the business calls for it, he may employ assistants whose acts will bind his principal. An attorney at law, an attorney in fact, a broker, an auctioneer, a factor, a partner, a ship's master, a ship's husband, these are all agents having power to bind their principals in matters coming within the scope of their respective employments. An attorney at law is an agent employed to conduct and manage an action at law or suit in equity. An attorney in fact is one who is by a power of attorney authorized to do some specific act or acts for his principal. A broker is one whose business it is to bring together parties who desire to deal with one another; he is the agent of both parties and he receives by way of compensation a commission. An auctioneer's business is to act for seller and buyer in selling goods at public outcry. When a sale is closed he can bind both parties by signing a memorandum of the terms. A factor or commission merchant is one who sells goods for persons who make consignments to him.

§ 207. A ship's husband is one employed by the owners to manage the affairs of the ship while it is at a home port. A ship's master has similar charge of the ship and its affairs while prosecuting its voyage. Partners

are mutual agents for one another in all matters pertaining to the conduct of the partnership business. An agent may act generally in some particular business, in which case he has a liberal discretion, or he may be employed to do a specific thing in a prescribed way, in which case he is a special agent. Where the authority under which an agent assumes to act is in writing the court must construe it and determine its extent; where the agency is created by parol or is implied from circumstances it is for the jury to determine whether a given act was or was not authorized by the principal. An authority to do a certain thing carries with it an authority to make use of all the usual and necessary means to effectuate the purpose intended, as where an agent is authorized to sell property he may receive the money; if he is to settle losses with an insurance company he may arbitrate the claims; if he is to sell a chattel he may warrant it as to quality and soundness—in short, the authority of an agent covers all the settled usages of trade which pertain to the business of his agency.

§ 208. Where persons dealing with an agent know that his authority is in writing, they are bound by its terms, whether they see fit to examine it or not. If an agent has a written authority, his principal can not, by private or secret instructions to his agent, change its terms so as to affect those who deal with him. It sometimes happens that the authority is ambiguous in its terms, and the agent has no opportunity to consult his principal. If he misconstrues the authority in good faith, his principal is bound by his act.[1] It is competent for the principal to enlarge the agent's authority by subsequent parol instructions.

And if a principal by words or acts induces others to believe that the agent's authority is greater than is expressed in the terms of the appointment, he will be bound by the agent's acts to the extent that his conduct has led others to deal with his agent. The authority of the agent is more liberally construed when it is to be gathered from irregular correspondence, or the conduct of the parties, than where it is particularly defined by a written instrument prepared for the purpose. If an agent acts in excess of his authority, his act may be ratified by the acquiescence of the principal. If by the usages of a bank or a merchant, cashiers or other employes are allowed to indorse paper and do other acts in furtherance of the business in which they are engaged, the principal will be bound. Declarations of an agent concerning the transaction in which he is acting for his principal will be binding on the principal, if made at the time and as a part of the transaction. But after the business is closed, the agent can make no such binding declarations. Factors and ships' masters may in case of urgent need dispose of perishable goods, in a way not authorized by the owner. They may also incur liabilities that will create a lien upon the goods and fix a personal responsibility upon their principal also.

§ 209. The duties of an agent can not ordinarily be delegated. In making contracts for his principal, he should disclose the fact that he is an agent, otherwise the person who deals with him without a knowledge of that fact may treat him as a principal. An agent who takes employment from another contracts for the use of reasonable skill and diligence in con-

ducting the business of his principal, and if loss occurs from the fraud or insolvency of a customer, he will not be liable, if he exercised such skill and diligence. He is chargeable with all profits he may make on investments of his principal's money, and if he fails to account promptly for moneys received, he may be chargeable with interest.

The contract of agency may be determined: (1) By the expiration of the time limited by the employment. (2) Principal may revoke it, except in cases where the agent has an interest in the business. (3) By the agent renouncing the agency. (4) By death, bankruptcy, or insanity of principal. (5) By destruction of subject-matter, as where one is custodian of buildings which are destroyed.

CHAPTER XVII.

OF PARTICULAR CONTRACTS.

§ 210. **Contracts of sale and exchange.**—Having considered the nature of contracts in general, and how and by whom they may be made, we proceed to inquire into the nature of particular contracts, and first of contracts of sale and exchange. Kent says: "A sale is a contract for the transfer of property from one person to another for a valuable consideration. Three things are requisite for its validity: the thing sold, which is the object of the contract, the price, and the consent of the contracting parties." By the Roman law things sold and delivered did not become the property of the buyer until he had paid the seller the price or satisfied him in some way or other, as by procuring some one to be security or by giving a pledge. But if the seller accepted the credit of the buyer the thing then immediately became the property of the buyer. And this is practically the law now in all civilized countries.

§ 211. The thing sold must exist. A contract of sale of a dead horse, which the parties think is living, is no sale. So of the sale of a house which had been destroyed, if the house and not the land on which it was built was the principal thing in the minds of the contracting parties. When goods are sold there is an implied warranty that the seller has title.

There is no warranty of title to real estate sold unless it is expressed in the conveyance. If one in due form contracts for the sale of real estate, and refuses to convey, the court at the suit of the buyer will compel the seller to convey, if the buyer has performed or tendered performance of his part of the contract; or if the buyer elects he may sue the seller for damages. Except in rare cases, as where the contract is for the sale of stock in a corporation, courts will not compel the seller of personal property to transfer it to the buyer, leaving the buyer to his action for damages.

As to the quality of goods sold there is no warranty implied, except in cases of sales by sample there is a warranty that the goods sold will be of the same quality as the sample. There may be latent defects in the article unknown to both parties, and in such cases the buyer takes it at his own risk, but if the seller knew of such defects his concealment of them might amount to fraud, which would give the buyer a right to rescind the contract or sue for damages. Where defects of quality were apparent and each had equal means of information, there is no fraud, nor will mere statements of opinion as to value made by the seller amount to fraud.

If in a sale of several tracts of land or several horses at the same time title fails as to part, the buyer can not be held to the contract unless he waives his right to object. Of course, if there is a total failure of consideration the contract is void. If parties are negotiating by letter for a sale, the party making the offer may revoke it at any time before it

is accepted; once accepted, however, it can not be revoked.

§ 212. **Transfer of title.**—When does the title to the thing sold pass from the seller and vest in the buyer? When the terms of the sale are agreed upon and the seller has performed his part of the contract, from that instant the property is at the risk of the buyer. So, when the terms are agreed upon and the buyer pays or tenders the price, he is entitled to possession of the thing purchased. These general rules may be varied by the agreement of the parties, fixing a different method of payment, postponing the time of delivery, etc. If credit is given, the title passes to the buyer without payment, but if in such case the buyer becomes insolvent after the purchase and before the thing purchased comes to his possession, the seller may reclaim the goods, and defeat the buyer's title by asserting what is called the right of stoppage *in transitu*.

§ 213. **Delivery.**—As we have seen in what has been said concerning the statute of frauds, if the value of the chattel sold is fifty dollars or more, and it is not convenient to make prompt delivery, the contract of sale may be made binding by a memorandum or by the payment of part of the purchase-money. And a delivery of a part of the goods sold and an acceptance of them by the buyer will bind the bargain. Even where earnest money is given, the balance of the purchase-money must be paid before delivery, unless credit is given. Where nothing is said as to the time for payment and delivery, they are both to be done at the same time. In all sales where anything remains to be done by the

buyer, such as the giving of a note or security for the purchase-money, the property does not vest in the buyer until that condition is performed, unless it is waived by the seller. Delivery to the agent of the buyer, or to a carrier for him, is a good delivery, and where no particular mode of carriage is named in the contract, the seller may send the goods by any of the customary modes of transportation. There may be a symbolical delivery of the things sold, as by giving the key of the warehouse which contains them to the buyer. Marking the goods sold with the name of the buyer, or setting them apart by his request, in a place designated by him, may constitute a good delivery. If no place for delivery is fixed by the contract, the rule is that they are to be delivered at the place where the contract is made, or where the goods sold are kept for sale. A note payable in specific articles, as in wheat or any other commodity, must be presented for payment at the farm or place of business of the maker of the note. Secret sales of personal property, which is left in the possession of the seller, are not absolutely void, but the retaining of possession by the seller is a strong circumstance tending to show that the sale was a sham, especially where the seller is in debt and embarrassed at the time. The federal courts hold that a bill of sale is fraudulent as to third persons, unless possession is given to the buyer. The decisions of the state courts are not all in harmony with this rule.

§ 214. **Interpretation of contracts.**—Contracts are to be interpreted according to the manifest intention of the parties, words being taken in their popular sense. In construing a written contract, if the lan-

guage is ambiguous, the whole instrument is to be considered with all the circumstances surrounding the parties at the time it was made. If the contract is expressed in such vague and doubtful terms, that the intention of the parties can not be ascertained from reading it, it is void.

§ 215. **Contracts of bailment.**—Bailment is the delivery of one's personal property to another for a temporary purpose, to be returned to the owner when the purpose is fulfilled. Some writers give five kinds of bailment, but Story's classification is simpler. He gives three: (1) Bailment for the benefit of the bailor. (2) For the benefit of the bailee. (3) For the benefit of both. The degree of care to be exercised by the bailor depends upon the character of the bailment and the character of the article bailed. A mere borrower of another's property, who is to make no return for the use of it and is a bailee for his own benefit, is held to the exercise of the highest degree of care, or extreme care. One who hires a horse from another is a bailee for the benefit of both parties, and is not required to exercise so high degree of care as a bailee for his own benefit, but the care must be such as a prudent person would exercise with reference to his own property, or what is called ordinary care. Where property is left by the owner with another for safe keeping, without paying or agreeing to pay therefor, it is a bailment for the exclusive benefit of the bailor, and only a slight degree of care is required of the bailee. Of course, one is not bound to become a gratuitous bailee, and a promise to become such is not binding, but if goods are received by a gratuitous bailee he must care for them according to his

promise. A common carrier is a bailee who is bound to receive goods and deliver them where directed without loss or injury unless prevented by the act of God or the public enemy. A carrier who does not hold himself out to carry for the public, but only occasionally transports goods for hire, is not a common carrier, and is only held to the exercise of ordinary care. An innkeeper is a bailee who insures the safety of his guests' goods, just as a common carrier does.

A mechanic who receives material to be made into an article, or receives an article needing repairs, is a bailee who is bound to use reasonable diligence in completing the work and restoring the article to the owner. He may, however, demand pay for his work and keep possession of the article until his reasonable charges are paid. A warehouseman is a bailee who can retain possession of property put in his care until his storage charges are paid. A pledgee, or a pawnbroker, is a bailee who holds personal property as security for a debt, and may retain it until the debt is paid or payment tendered. If, after a bailee has received property, a third party claims it, the bailee may refuse to deliver to either until the controversy is settled between the rival claimants, and he may bring his action of interpleader, in which the claimants may be required to come into court and try the question of the title or right to possession of the property in the possession of the bailee.

§ 216. Common carriers.—The contracts of common carriers relate to persons, as well as personal property, and the subject of their rights and liabilities calls for a more extended treatment than could be

properly given to it under the head of bailment. Railway, steamboat and ship companies, and all other public agencies for transporting goods or persons for hire, are in law common carriers. The contract of a common carrier of goods is to receive and promptly transport the property entrusted to him, to the place of destination, he being responsible for all loss or damage which happens to the goods while in his care, unless such loss or damage is caused by the act of God or the public enemy. As a carrier of persons, he is held to the highest degree of care for their safety. By holding himself out as a common carrier of passengers, he undertakes to receive all proper persons who present themselves for transportation, and to carry them safely to their destination, upon their paying or tendering to him the customary fare for such service. And if he receives as a passenger one who is to be carried gratuitously, he must exercise the same care for such passenger as if he paid full fare. The same obligation as to care applies to persons whom he receives from other connecting lines of transportation, and to travelers who get upon the wrong railway train by mistake. Carriers are not insurers of the safety of their passengers. If the passenger is injured or killed, through unavoidable accident, as where injury or death results from defects in machinery or appliances which could not have been discovered by the exercise of the highest degree of care, or if the injury or death results from the act of God, as where by a tornado an obstruction is thrown in front of a locomotive engine, the carrier is not liable, unless there is some concurring negligence on his part. Ordinarily, a passenger who is

injured by a third person, not in the employ of the carrier, has no claim upon the carrier, but if, through the negligence of the carrier's employes, a dangerous person, as a lunatic or a drunken man, kills or injures a fellow-passenger, the carrier is liable. The carrier has a right to make reasonable rules regulating the conduct of passengers, and if a passenger with notice of these rules violates them and puts himself in a place of danger, and injury results to him on account of his misconduct, he has no claim for damages.

§ 217. **Contracts of partnership.**—Partnership, as defined by Kent, "is a contract of two or more persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." As we have seen in stating the principles of the contract of agency, each partner is the general agent for all the others, and may bind them by any contract which he may make within the scope of the partnership business. If a member of a firm of dry-goods merchants buys real estate for purposes of speculation in the firm name, it will not bind his copartners, and so of all ventures not within the scope of the firm's business. As between the partners themselves they may limit the powers and fix the duties of one another by agreement, and a violation of such agreement resulting in loss to the other partners would make the wrong-doer liable in damages to his copartners. A nominal partner is one who allows his name to be used by the firm, but has no interest in the profits; his liability for the firm's debts, however, is the same as that of the real mem-

bers of the firm. A silent partner is one who has an interest in the firm which is unknown to the public. He may share in the profits, and he is liable for all the debts of the firm. When a partner retires from the firm and wishes to avoid future liability for its debts, he must give actual notice of the fact to all customers of the firm, and notice to the public by printing the same in some newspaper of general circulation in the locality where the business has been conducted. If one holds himself out as a partner, and persons deal with the firm on the faith of it, he is held liable to such persons for the firm debts, though he was not a partner in fact.

§ 218. **Formation of partnership.**—To form a partnership it is not necessary that the contract should be in writing, and if there is no agreement to the contrary, the partners are presumed to be equal, and the partnership is presumed to begin at the date of the agreement. Partnership contracts may be made for the carrying on of any lawful business. Inequality of skill, industry, ability, or attention to the business will not increase or diminish a partner's share of the profits unless the agreement between the partners makes provision for it, and unless it is so agreed no partner is entitled to anything but his share of the profits as a compensation for his services. One may sometimes share in the profits without incurring liability as a partner, as where a salesman or an agent agrees to take as a compensation for his services a sum equal to a certain per cent. of the profits.

§ 219. **Rights of partners.**—Partners can not deal with the partnership property for their individual

benefit to the injury of the creditors of the firm or of their copartners. If one partner has made advances or incurred liabilities for the firm, his claim upon the firm's assets and property will have priority over a chattel mortgage given by another partner to secure his individual debt.

§ 220. **Dissolution of partnership.**—A partnership may be dissolved in various ways, as: (1) By the death of one of the partners. Sometimes the articles of partnership provide that the representative of the deceased partner may continue the business, or that the capital of the deceased partner shall remain for a limited time in the firm business. (2) By the transfer of the interest of one partner. (3) By the voluntary withdrawal of a partner from the firm. Though the partnership agreement may fix the duration of the partnership, any partner may dissolve it by retiring before the expiration of the time. If his conduct in so doing is wrongful and results in loss to his copartners, they may recover damages from him for breach of his contract. (4) Insanity or insolvency of a partner. (5) By the mutual consent of the partners. (6) The sale of the whole property invested in the partnership business. (7) The hopeless insolvency of the firm. (8) The occurrence of some event which makes the business of the partnership illegal. The court may decree a dissolution at any time when the interest of the partners or the firm creditors require it.

§ 221. The practical effect of the dissolution, from whatever cause, is the same. If the partners can agree upon a method of winding up the business after dissolution, and creditors do not object, it may

be done in that way. If creditors or any partner objects the court will appoint a receiver, whose duty it will be to sell the assets, pay the creditors and expenses of the receivership, and distribute the surplus among the partners according to their respective interests.

§ 222. Where a dissolution results from the death of one of the partners, the surviving partners are clothed by the law with authority to settle the firm's affairs, and the personal representatives of the deceased partner can not meddle with the firm's affairs unless there is mismanagement on the part of the surviving partners. Most of the states have statutes providing for the settlement of the partnership business by surviving partners, requiring them to file inventories in court, to give bond, and to make reports of their doings, as in case of administrators and executors.

§ 223. **Individual and partnership creditors.**— Questions arise concerning the conflicting claims of the creditors of the firm and the individual partners to participate in the assets of the partnership, and of the partners individually. The equitable rule is followed in all the courts, that firm creditors must look first to firm assets, and individual creditors to the assets of the individual members of the firm. If there is a surplus of the firm assets after paying firm creditors, and a deficiency of individual assets to pay individual creditors, these creditors may resort to the share of the surplus which would be going to the partner against whom they hold unsatisfied claims; so may firm creditors, after exhausting

firm assets, resort to what may remain of individual assets after the discharge of individual debts.

§ 224. **Rights of partners after dissolution.**—The dissolution of the firm puts an end to the power of the partners to bind their copartners to any new engagements, except so far as it may be necessary or proper in closing up the firm's business. Where one partner retires and the remaining partners assume the firm debts, the retiring partner may be held by the creditors, but if he is compelled to pay he would have the same rights against his former partners that a surety who had paid a debt would have against his principal.

§ 225. **Limited partnership.**—We have been speaking of general partnerships, in which each and all of the partners are individually liable for all the debts of the firm. Limited partnerships are creatures of statutory law. They are partnerships in which the pecuniary responsibility of some of the partners is limited to a fixed sum. Persons wishing to embark their means in such ventures are required to comply strictly with the provisions of the law authorizing their formation.

§ 226. **Good-will.**—The good-will of the partnership goes to the surviving partners in case of dissolution by death, and where one partner disposes of his interest to his copartners, his interest in the good-will goes with it.

CHAPTER XVIII.

NEGOTIABLE INSTRUMENTS.

Contracts in the form of bills of exchange and promissory notes will now be considered.

§ 227. **Definitions.**—The old definition of a bill of exchange, which is approved by Kent, is as follows:

A bill of exchange is a written order or request by one person to another, for the payment of money at a specified time, absolutely and at all events.

Story defines a promissory note as:

A written engagement by one person to pay another therein named absolutely and unconditionally a certain sum of money at a time specified therein.

§ 228. **Origin of law merchant.**—Bills of exchange which were first used by the bankers and merchants of Florence and Venice, to facilitate the transfer of credits between distant points, came to England through France early in the fourteenth century. Negotiable notes did not come into use in England until about two hundred years ago. Embarrassments arose in the application of the common law of England to these forms of contract, and it was after a long struggle that the courts engrafted upon the common law the law merchant, by which the parties to bills and notes are put upon a footing entirely different from that of parties to other contracts.

Promissory notes are negotiable or non-negotiable, according to the laws of the various states where they are made or are to be paid.

Some statutes require that the note, to be negotiable according to the law merchant, must be payable to the order of the payee; some that it must be payable to his order and at a bank of discount and deposit. Some authorities hold that a promissory note is negotiable, without the phrases "or order" or "to the order." Notes payable to bearer are negotiable by delivery.

§ 229. **Foreign and inland bills.**—A foreign bill of exchange is one that is drawn in one state or country and payable in another, and the several states of the Union are foreign to one another in this respect.

An inland bill of exchange is one that is drawn and payable in the same state or country.

§ 230. The parties to a bill of exchange may be the drawer, who is the maker; the drawee, the person who is requested to pay it; the payee, to whom by the terms of the bill it is to be paid. We give a simple form of a bill with the three parties named:

$500.00. NEW YORK, May 1, 1895.

At sight pay John Jones (payee) or order five hundred dollars, value received, and charge same to account of JOHN SMITH (drawer).

To RICHARD ROE (drawee), Philadelphia.

§ 231. **Indorsement.**—If John Jones, the payee, wishes to transfer the bill he does so by simply writing his name on the back of it and delivering it to the person to whom he transfers it, and this new party, so long as he keeps the paper, is the indorsee or holder. If he in turn wishes to transfer it, he

writes his name on the back and gives it to the person to whom he transfers it, in which case he loses his character as indorsee and holder and becomes an indorser, and the person to whom he transfers the paper becomes the indorsee and holder.

§ 232. **Duty of the holder.**—It is the duty of the holder of the bill, whether he be payee or indorsee, to promptly present it to the drawee for payment, if it is payable at "sight," or to present it to him for acceptance if it is a time bill, that is, payable at a future date. If the bill is accepted the drawee evidences his acceptance by writing across the face of the bill the word "accepted," and signing his name under it. If when presented to the drawee he refuses to pay or accept the bill, it becomes the duty of the holder to have it protested; that is done by a notary public who presents it for payment or acceptance at the place where it is payable in business hours, and upon acceptance or payment not being made, he protests the bill and makes a certificate, attested by his signature and notarial seal, showing the fact of presentment and non-acceptance or non-payment, as the case may be. Notice in writing of protest must be promptly given by the notary to the drawers and indorsers, if any, in order to fix their liability to the holder. If the bill is not presented in time, and if notice of non-acceptance or non-payment and protest is not promptly given, the drawer and indorsers are discharged from liability, unless by the terms of the bill presentment, demand and protest are waived.

§ 233. **Special indorsements.**—The form of indorsement, and the rights and liabilities of indorsers

and indorsees, are not always the same. By an indorsement "without recourse," the indorser engages that the instrument is the valid obligation of those whose names are upon it and that he has the right to indorse it, but does not warrant the solvency of any of the parties to the bill. By an indorsement in blank the indorser makes himself liable to any one who comes into possession of the bill honestly. If his indorsement is special as to a particular person, he is only liable to the person named or to the indorsee of the person named and those claiming through him.

§ 234. **Signatures and date.**—A note or bill of exchange must be in writing and signed; the initials or a mark will be a good signature, and it is immaterial where the signature is placed; the party making it will be bound according to his intent. A date is not essential, and if there is a blank for a date any holder in good faith may fill it. Until a note is delivered it has no force. Indorsements are presumed to be of the date of the note, but the real date is matter for proof.

§ 235. **Certainty.**—We have seen that the promise to pay must be without condition, and if conditions are annexed the paper is not negotiable by the law merchant. It must be for the payment in money. A promise to pay in grain or any other specific article is not a negotiable note. The time of payment must also be certain; it may be fixed by any event which is sure to occur, as the event of one's death; if payable on demand it is due instantly. So it is necessary that the place of payment should be certain. If no place is named then the place where the maker or

drawee resides is presumed to be meant. The amount to be paid must be certain. If the amount is expressed in figures and in writing and they differ, the writing controls.

§ 236. **Surety, guarantor, indorser and assignor.** —In addition to the original parties to negotiable instruments, the following may become liable thereon, viz., surety, indorser, guarantor, or assignor. The rights and obligations of each are different.

A surety is generally a co-maker, and his promise is to meet an obligation which becomes his own the moment the principal fails to meet it. A surety is liable as much as the principal is liable, and he may be sued as a promisor. He is entitled, however, to have the principal's property first exhausted for payment of the obligation.

A guarantor's promise is to pay the debt of the principal, if by the exercise of due diligence the debt can not be made out of the principal. He is entitled to notice of the non-payment within a reasonable time, but is not discharged from liability by delay in the notice, unless actually damaged thereby.

An indorser contracts to be directly liable, but only upon condition of due presentment of the bill or note on the exact day of its maturity, and due notice of its dishonor. Failure in either particular discharges him absolutely from liability, whether he be damaged or not by the failure.

An assignor of a negotiable instrument is one who passes the title by mere delivery, without writing his name upon it. This may happen when the instrument is payable to bearer or indorsed in blank. The assignor does not promise that the obligation shall be

paid, but he warrants that he knows no facts that will prove the instrument to be valueless.

In addition to the distinctive obligation of each, the indorser and the assignor each warrants: (1) That the instrument is genuine, (2) that it is valid, (3) that prior parties are competent, and (4) that he himself has lawful title to the instrument and right to transfer it.

§ 237. **Law of the place.**—Where a bill or note is made in one place and is payable in another, the law of the place of payment fixes the rights of the parties. Where money payable in one state is secured by a mortgage upon land in another, it is difficult to determine what law controls. Where it is attempted to enforce payment by foreclosure, the general rule, in the absence of statutes to the contrary, is that the rights of the parties as to the rate of interest are ascertained by reference to the law of the place of payment, but that in all that relates to the enforcement of the remedy, the law of the place where the mortgaged property is situated will control.

§ 238. **Agents.**—In the execution of notes by an agent, he should take care that he does not bind himself personally, and to avoid this he should always sign the name of his principal, and append to that his own name, with letters or words designating himself as agent. So partners giving notes in the firm's business should always sign by the firm name. If a note, negotiable in form, is signed and delivered to another, with the amount and date, names of drawee, payee, etc., left blank, the person to whom it is delivered is the agent of the maker to fill the blanks.

§ 239. **Capacity of parties.**—As to the capacity of persons to make and indorse notes and bills, and the effect of the various forms of legal disability, as infancy, insanity and the like, upon the rights of the parties, it is enough to say that the general rules governing contracts heretofore stated will apply.

§ 240. **Consideration.**—As between the original parties to a note or bill, some legal consideration is necessary to support it, but the obligation assumed by an indorser for the accommodation of one of the parties, by its very nature has no consideration to support it. If the accommodation indorser is obliged to take up or pay the note or bill, he has a right of action against all prior parties who are liable on the paper.

§ 241. **Purchase for value without notice.**—It is a distinctive quality of a negotiable instrument that if before it is due it comes into the hands of an innocent purchaser for value, he takes it free from any defenses or equities that may exist between prior holders or the original parties, respecting the title, the amount or the consideration. Though the instrument be stolen, though the maker may have claims against some prior holder, though the instrument be procured by fraud, be paid, or have no consideration, or involve usury—such defects perish with the transfer, so far as the innocent holder is concerned. Other defenses, such as forgery, alteration, infancy, etc., may be made by the party claiming the defense against even an innocent purchaser.

§ 242. **Bills of lading.**—A bill of lading is a written instrument acknowledging receipt of goods and agreeing to transport them to a specified place and

deliver them to the consignee or his assigns. It is a receipt and a contract, having the usual attributes thereof. It is at the same time the representative of the goods, and as such has certain qualities of negotiability that make it proper to consider them in connection with the subject of bills and notes. The holder of a bill of lading may by indorsing and delivering the instrument to another pass to the transferee the title to the goods represented, as fully as though the goods themselves were delivered. The transferee, if in good faith, takes the title free from any claims against the indorser, such as the right of stoppage *in transitu* or the right to rescind for fraud. But he takes only such title as the indorser actually had, so that if the bill of lading were stolen, or if the original shipper had no title to the goods, the indorsee could acquire none.

CHAPTER XIX.

CONTRACTS OF INSURANCE.

§ 243. **Definition.**—Insurance is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a specified peril. The party who insures is called the underwriter; the party indemnified is called the insured. When the contract is in writing it is called the policy. Unless prohibited by a law a verbal contract of insurance is valid. And so, after the execution and delivery of the policy its terms may be modified by verbal agreement. Insurance contracts may be made to pay a certain sum in case of death or accidental injury of some person, or of death or accidental injury to live stock; in case of loss of property by fire or tornado; in case of loss of ships or their cargoes by perils of the sea; in case of failure of title to property; in case of the temporary illness of the insured. These are all forms of indemnity contracts which may be properly called insurance contracts.

§ 244. **Contract, how made.**—The form of the contract is immaterial, unless there is something in the law or the charter of the company making it which requires it to be in a specified form. When the policy is issued by the company, and accepted by the insured, the rights and liabilities of the parties are

fixed by its terms. If all the terms of the contract have been agreed upon, and it only remains for the company to issue the policy, the failure to issue it will not invalidate the contract. When the contract takes effect is a question which is to be determined by reference to the rules already stated, under the head of contracts in general. Where the agent of the company agrees with the insured upon the terms of the contract, but with the express understanding that it is not to take effect until the company has approved it, no valid contract exists until such approval.

§ 245. **How interpreted.**—When made in writing, the interpretation of the contract is for the court, the object being always to arrive at the real intention of the parties. It can not be denied, however, that the rules of interpretation adopted in the courts of the country in insurance cases tend to the conclusion that insurance companies are not favorites of the law. Stipulations in a policy are construed liberally towards the insured, and strictly against the insurer. Even where a stipulation in a policy is violated by the insured, it will not prevent a recovery on the policy, unless it is expressly provided that such violations shall work a forfeiture.

§ 246. **Warranty and representation.**—Questions arise whether certain stipulations in the policy amount to a warranty or a representation merely. A warranty is a statement or stipulation inserted in or referred to in and made a part of the policy, upon the truth or performance of which on the part of the insured the validity of the contract depends. A representation is an incidental statement

made by the insured with regard to some feature of the risk upon the faith of which the contract is entered into. It is said to be no part of the contract, and that it need not be literally, though it must be substantially, true. So it is evidently a matter of difficulty in many cases to distinguish between the two. Intentional concealment of material facts will avoid a policy unless the company knew of their existence. Material facts are such facts only as may be fairly presumed to have been material in the belief of the insured.

§ 247. **Payment of premiums.**—The premium is the consideration for the insurance, and must be paid by the insured or by some one for him. Where the policy provides that the payment of the first premium must be made when the policy is delivered, it does not take effect, though delivered, until payment is made. Where a note is given and accepted for the premium, a failure to pay the note when due will not avoid the policy unless it is expressly stipulated that such shall be its effect. The manner of payment is immaterial if it is accepted by the company or its agent, and is in accordance with the usual course of business of the agent, known to the company. In companies where the insured is entitled to have his dividends credited as part payment of his premiums, it is the duty of the company to give him timely notice of the amount in cash which it is necessary for him to pay, the reason being that the company, having exclusive knowledge of the facts, is bound to make them known. Premiums falling due on Sunday may be paid on the following Monday.

§ 248. **Waiver of payment.**—An agent having authority to receive the premium may agree with the

insured to waive prompt payment, the agent becoming debtor to the company for the amount, and such waiver will bind the company. And even where the policy makes a failure to make prompt payment a cause of forfeiture, if the company has been in the habit of granting indulgence to the insured and accepting payments after due, it can not insist upon a forfeiture for a failure to make prompt payment.

§ 249. **Insurable interest.**—It is essential to a valid policy that the insured should have an insurable interest in the life, or the thing insured, and generally speaking, whatever has an appreciable pecuniary value, and is subject to loss or deterioration, or of which one may be deprived, or which he may fail to realize, whereby his pecuniary interest is or may be prejudiced, may properly constitute the subject-matter of insurance, the object of insurance being to protect men against uncertain events which may in any wise be of disadvantage to them.

§ 250. **Increase of risk.**—The doing of anything by the insured, or with his assent, which increases the risk of the company, will avoid the policy, as the removal of one whose life is insured to a place prohibited by the policy, or the change of a business carried on upon the insured property to another business which increases the danger of loss by fire. It is the duty of the insured who contemplates a change of that character to notify the company and procure its assent to the proposed change. In making answer to questions as to the previous serious illness of the applicant for life insurance, if the applicant in good faith believes his answer to be true, it will not avoid the policy, though his answer may be erroneous.

CHAPTER XX.

CONSIDERATION.

§ 251. **Definition.**—Consideration is something esteemed in law to be of value, in exchange for which the promise in a contract is made. The law estimates values in money, and the consideration must be something to which a jury can attach a pecuniary value. Natural love and affection named in a deed as a consideration will make the conveyance good, but a promise to convey, or a promise to pay money in consideration of natural love and affection, is not binding. As between the original parties to a negotiable promissory note, or bill of exchange, a consideration is necessary, but if the note or bill is purchased in good faith, before it is due, by a third person, he can enforce payment, although it was originally given without consideration.

A good consideration is blood, natural affection and the like. A valuable consideration is money, or some commodity, or marriage.

One who takes a deed based upon a good consideration only, takes the property subject to the rights of creditors who may be injured thereby. A man may give away his property if he retains sufficient to pay his existing debts. The maxim is that "a man must be just before he is generous."

A mere moral obligation imposed by a sense of

duty will not make a promise binding. A promise to pay money to another, prompted by motives of gratitude for past favors, is not binding. But a moral obligation, supported by a past legal obligation, will support a promise and make it binding. If a debt is barred by the statute of limitations, or by a discharge in bankruptcy, and the debtor makes a new promise to pay it, it is a good promise for the reason that though there is no present legal obligation to pay there is a moral obligation, and when the moral obligation rests upon what was a previous legal obligation, it is a valuable consideration and will support a promise.

§ 252. **Adequacy of consideration.**—The adequacy of consideration is something that courts will not inquire into except in cases of imposition or fraud. Parties capable of contracting are left to make their own bargains, and their mistaken estimates of values of things purchased or received will not be corrected. Where the inadequacy is so gross as to shock the moral sense it will be sufficient proof of fraud.

§ 253. **Prior obligation as consideration.**—Where the law has fixed the value of services to be performed, as by naming fees for official services, a promise to pay more is not binding. So, where one is already bound by a previous agreement, or by law to do a particular thing, the doing of the act is no consideration for a binding promise. If one owes a sum of money and pays part, and his creditor agrees to release him from the payment of the balance, it is not binding. But if a debtor gives his creditor some article not money, though of less value than the whole amount, and it is accepted for the whole debt,

it is a good discharge; and so if a debtor procures a friend to pay his creditor a sum less than the whole debt, such payment is a good consideration to support a promise to release the remainder. And a payment of a sum less than the whole debt before it is due is a good consideration to support a release.

§ 254. **Promise to release debtor.**—Where a man is embarrassed and his creditors mutually agree to take a portion of their respective debts in discharge of all, it is binding, the consideration for the discharge being the mutual promises of the creditors and not the amounts of money they receive.

§ 255. **Disputed claims.**—Where there is a dispute as to the amount due, and the creditor agrees to accept less than what may really be due in discharge of the whole, it is good. Where a man makes a claim against another in good faith and threatens to bring suit, and money is agreed to be paid if he will not sue, the agreement is binding; but if the threat is merely to extort blackmail, and the claimant does not in good faith believe he has a just claim, such agreement can not be enforced. The consideration promised must be something beneficial to the promisee or to a third person, or a detriment to the promisor. A simple agreement to extend the time of payment is not binding, unless extra interest is agreed to be paid, or interest is paid in advance or something of value given. So, if one agrees to carry goods for nothing it is not binding, but if he receives the goods after making such a promise, he must carry and deliver them safely. Communicating knowledge, and the advice of a lawyer or physician are sufficient considerations.

§ 256. **Impossible and illegal consideration.**—An

agreement to do a thing absolutely impossible to be done is no consideration, nor will an agreement based upon an illegal or immoral consideration be binding. Where, at the time of the contract, the thing contracted for is not in existence, there is no consideration, as when two in good faith bargain for the purchase and sale of a horse, supposing it to be alive, when in fact at the time of the agreement it is dead.

§ 257. **Executed and executory considerations.**— The consideration is executed where the thing agreed for is done or given, and it is executory where the thing promised remains to be given or done. If one is employed to labor for a sum certain, the consideration is executed on his part when the labor is performed, and it is executory on the part of his employer until payment is made.

§ 258. **Past consideration.** — The consideration must consist of a present or future act; a past act can not serve as a consideration for a promise. This rule operates very harshly in some cases, as where a son of full age fell sick and was cared for by strangers, who paid the expenses of his sickness, it was held that a subsequent promise by the father to reimburse them could not be enforced. It is now established law that the past performance of services constitutes no consideration even for an express promise, unless they were performed under the express or implied request of the defendant, or unless they were done in performance of some duty resting on him.

§ 259. **Failure and want of consideration.**—A contract may be based on a consideration apparently good, but which fails altogether, in which event the contract

will not be enforced. As where a promissory note is given for a horse warranted to be sound, which turns out to have been diseased and worthless at the time, the maker of the note is absolved from his liability to pay it, unless it is a negotiable note in the hands of one who purchased it in good faith before it was due. Even where money is paid on a contract supposed to be valid, if the consideration fails the money may be recovered back. If there is no warranty of the thing sold, or if the defects complained of were apparent, failure of consideration can not be pleaded. Ordinarily, in a sale of personal property the seller warrants the title, but if at the sale it is clearly stated or understood that the seller is simply disposing of his interest in the thing sold, and the title fails, it is no failure of consideration, for the buyers gets all he bargained for. The subsequent depreciation in value of the thing sold, as when by new inventions a patent is made worthless, is not in law a failure of consideration.

If a contract is based upon a consideration in part legal and in part illegal, it will be enforced as to the legal part if it can be separated, but if no separation can be made, the whole contract fails for want of consideration.

A party to a contract, having full knowledge of the facts, may waive his right to plead a want or failure of consideration, as he may waive his right to plead the statute of limitations, his discharge in bankruptcy, his infancy or the like.

CHAPTER XXI.

STATUTE OF FRAUDS.

§ 260. **History of the statute.**—To prevent frauds and perjuries, a statute was enacted in the reign of Charles II in England, in the year 1677, providing that no action should be brought to enforce certain agreements, "unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." It is to be noticed that by this statute parties are not prohibited from making such agreements by parol, but the performance of such parol agreements is purely voluntary. It is simply declared that the courts will not aid in enforcing them. There is some curious history as to who is entitled to the credit of suggesting or formulating this law. Some give it to Lord Hale, but the better opinion is that Lord Nottingham is its author. That it is regarded as a good law in principle is shown by the fact that its most important provisions have been re-enacted in all English-speaking countries, especially the fourth and seventeenth sections of the statute.

§ 261. **Provisions of the statute.**—The fourth section provides that no action shall be brought whereby to charge:

(1) Any executor or administrator upon any special promise to answer damages out of his own estate.

(2) Or to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person.

(3) Or to charge any person upon any agreement made upon consideration of marriage.

(4) Or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them.

(5) Or upon any agreement that is not to be performed within the space of one year from the making thereof.

Unless the agreement or some memorandum thereof in writing should be signed as above required.

The seventeenth section provides that no contract for the sale of any goods, wares and merchandise for the price of ten pounds sterling (fifty dollars) or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, unless some note or memorandum of the bargain in writing be made and signed, as required in the fourth section.

Let us consider the contracts affected by the statute, in the order in which they are mentioned in the statute itself.

§ 262. **Promises of executors and administrators.** —An executor or an administrator coming into possession of the estate of the testator or decedent, is only liable to pay the debts of the estate in the order required by law and so far as the assets of the estate

properly administered will enable him to discharge such debts. This legal obligation and no other rests upon him, unless he sees fit to assume and incur a personal liability for the debts of the estate. If he does this in a writing, signed by him or his agent, he is bound, but no oral agreement on his part can create such a liability. The statute applies only to debts existing against the estate. If the executor agrees with an heir to pay a sum of money if he will abstain from bringing suit to contest the will or the probate of it, this is a personal undertaking of his own, and one which does not fall within the statute.

§ 263. **Debt, default and miscarriage.**—What is meant by the terms "debt," "default" and "miscarriage" of another, for which one shall not be answerable upon his oral promise? It may be said, generally, that under these terms are included every form of liability or obligation which rests upon one, whether it grows out of tort or contract, or from whatever cause. There are three persons to be considered: (1) The person who owes the debt or has incurred the liability. (2) The person to whom the debt is owing or who is entitled to enforce the existing liability. (3) The stranger to the transaction, against whom no liability exists, and whom it is sought to charge with the liability of the debtor or wrong-doer.

§ 264. **Original or collateral obligation.**—Whether an oral promise is enforceable or not under this clause of the statute depends generally upon the question whether the promise is an original obligation or is collateral to some other's obligation. If the former, it would be valid; if the latter, it would be barred. For example: If A promises to pay for

goods furnished to B, who makes no promise, it is evident that A's promise is the only and original obligation, and that it is not within the statute of frauds. But if B promises to pay for the goods, and A promises to pay in case B fails to do so, A's promise is collateral, and an action on it is barred by the statute.

§ 265. **Agreements in consideration of marriage.**—It is hardly necessary to say that this clause of the statute does not refer to the mutual promises of marriage. It has sole reference to promises collateral to the marriage which are made upon condition that the marriage shall take place, as where a man agrees to make a settlement or pay a sum of money if a marriage is consummated. An antenuptial agreement by which, before marriage, a woman agrees to relinquish her marital rights in her husband's property, in consideration of the payment to her of a sum certain, is within the statute and must be in writing to make it binding. Nor is the subsequent marriage of the parties such a part performance of the contract as will take the contract out of the statute.

§ 266. **Contracts for sale of lands.**—The word land as it is used in this statute has been held to include not only the land itself, but every claim of a permanent right to hold lands of another for a particular purpose, and to enter upon them at all times without his consent. A mere verbal license to enter upon land for a temporary purpose is revocable. Difficulties arise as to what things annexed to land are covered by the term as it is used in the statute. A ripened crop ready to be gathered, and a sale of any growing produce, raised by labor and expense, in actual existence at the time of the contract, may be

the subject of a binding parol contract. And it has even been held that where timber or other produce of land, or any other thing annexed to the land is specifically sold, whether the buyer or seller is to sever it, under a special license to enter for that purpose, it is a sale of goods and not a sale of an interest in land. By statutes of some of the states, it is enacted that leases of land for short terms are valid, though resting in parol.

§ 267. **Agreements not to be performed within a year.**—The agreement must be impossible of performance within the year, and the parties to it must contemplate that it shall not be performed within the year. The mere fact that it may not be, or is not in fact performed within the year, does not bring it within the statute. Illustrating these rules, it has been held that an agreement to do something upon the happening of a marriage, or upon the return of a ship, or to pay a certain sum of money from time to time during the life of another, is not within the statute. But if it can not be fully performed within the year, the fact that it may be terminated, or that further performance may be excused, is not sufficient to take it out of the statute. In most of the states it is held that the statute applies only to contracts which are not to be performed on *either* side within a year; and that if the parol contract is to be fully performed on one side within the year, it will be good under the statute of frauds even though the other side can not be performed within the year. Other states hold the contrary doctrine.

§ 268. **The note or memorandum.**—The statute requires that to make any of the contracts or agree-

ments just enumerated as within the fourth section of the statute of frauds enforceable, the agreement, or some note or memorandum thereof, shall be in writing and signed by, or by the authority of, the person sought to be charged thereby. It becomes important to know what sort of a note or memorandum is here meant. The statute relates to a parol contract, the evidence of which must be supplied by a written note or memorandum. This memorandum may be gathered from correspondence or embodied in a single letter, and it is not necessary that it be made at the time of the agreement. It is rather the acknowledgment of the fact that a contract has been made than a written contract itself, which is an instrument entered into and signed at the time it is made. The memorandum may be made by a broker who is the agent of both parties; it may be made by an auctioneer who is agent for buyer and seller; it may be made by one of the parties and not delivered to the other, or the fact that it has been made may be unknown to the party who seeks to enforce it until long after it has been made; it may be made at any time before the action is commenced. It must show agreement on the part of the party sought to be charged; it must show clearly the subject-matter and all the terms of the agreement, the parties to it, and some courts hold that it must show what the consideration is. Some of the states in their laws adopting the provisions of the statute expressly state either that the consideration must appear in the memorandum or that it is unnecessary.

§ 269. **Signature to memorandum.**—The signing may be by the party sought to be charged, or by his authorized agent. A mark of an illiterate man is a sufficient signing, or the initials of a name. The place of the signature is unimportant. If the memorandum was written by the party or his agent, and his name appears in the body of it, it is sufficient.

§ 270. **Sale of goods, wares and merchandise.**—Oral contracts for the sale of goods worth fifty dollars and over can not be enforced, unless, (1) the buyer receives part of the goods, (2) the buyer gives something in earnest to bind the bargain. This section does not apply to contracts for labor, nor where one goes to a mechanic and orders the manufacture of an article. On this point there is a conflict in the decisions. It is held by some courts that if the buyer gives an order for the manufacture of an article which is usually kept in stock it is within the statute, but that if he orders something of a particular pattern to be made to suit his own fancy the statute does not apply, and this appears to be the weight of authority. Sales at auction are within the statute, and it is the duty of the auctioneer when he announces a sale to make a memorandum of it or to deliver the goods. In order to make a delivery of a part of the goods effective, the delivery must be complete and be accepted by the buyer; so where it is desired to bind the bargain by a delivery of something in earnest, the payment must be made if in money, or the article actually delivered if it is something else than money, and this may be done at any time before suit, unless the

statute requires it to be done at the time the bargain is made.

As to the form of the memorandum necessary to bind a bargain for sale of goods, what has already been said of the requisites of the memorandum to bind agreements for the sale of lands will apply.

CHAPTER XXII.

CORPORATIONS.

§ 271. **Definition.**—A corporation is a body consisting of one or more persons, established by or under the authority of the law, for certain specific purposes, with the capacity of succession (either perpetual or for a limited period) and other special privileges not possessed by individuals, yet acting in many respects as an individual. Corporations are either sole, consisting of one member at a time, or aggregate, consisting of more than one member. A public corporation is created for the purpose of carrying on some public business, such as towns, cities, counties. A private corporation is formed by the voluntary act of individuals for their own convenience or profit, such as banking companies, turnpike and railway companies. These are in a sense public, for they render service to the public, but they are distinguished from public corporations by the fact that the latter are founded by the government for public purposes alone. There is another class designated as *quasi* corporations, which have some of the attributes of ordinary corporations, as boards of school commissioners, boards of county commissioners, boards for the equalization and assessment of taxes, boards of supervision of poor-houses, etc. Joint stock companies, formed for the

purpose of carrying on commercial or manufacturing enterprises, which have all the features of a partnership, except that there is a substitution of a stockholder's liability for the ordinary liability of partners, are *quasi* corporations.

§ 272. **Powers of corporations.**—The powers of a corporation are restricted to the limits prescribed by the law under or by which it is created. (1) A corporation should have a name by which to make contracts, to take, hold and dispose of property, and by which to sue and be sued. (2) It should have a corporate seal. (3) It should have a fixed place of business for the general management of its affairs. (4) It may make its own by-laws, and appoint and remove its agents and officers.

§ 273. **Organization of corporations.**—The power to create corporations is vested in the legislature by the constitution. The practice and power of creating corporations by special legislative enactments has fallen into disuse, or been abolished in most of the states. General laws are passed, under which corporations are organized by the voluntary agreement of individuals. The manner in which corporations are organized is determined by the statutes of each state. Ordinarily articles of incorporation signed and acknowledged by the requisite number of persons are filed in some public office. These articles give the name of the corporation, state the object of its formation, designate the place where it proposes to carry on its business, fix the amount of capital stock and the denomination of the shares of stock, the names and residences of the stockholders, and the names of the directors who are to manage the af-

fairs of the corporation for the first year. When these articles, so prepared, signed and acknowledged, are lodged in the proper office, the corporation begins its existence. If any of its members assume to contract or act as a corporation before these requisite formalities have been complied with, such acts are not corporate acts, though they may bind the individuals who have so acted. A corporation is considered to be a citizen of the state under whose laws it is created, and if it wishes to exercise corporate powers in another state, it must submit to and obey such laws and restrictions as may be imposed by the laws of the state in which it does business.

§ 274. **The charter.**—The charter, or law under which a corporation is organized, is the measure of its powers. In construing such charters and laws the courts have extended the powers of corporations to all such matters as are essential to preserve their existence and to accomplish the purposes of their creation. The enumeration of specific powers implies the exclusion of others.

§ 275. **Vested rights of.**—It is a settled rule of law that when a private corporation is once formed according to law, it has the right to the free use of all the franchises, powers and privileges conferred upon it by the laws in force when it came into existence, and that the provisions of the constitution of the United States prohibiting all legislation which impairs the obligation of contracts protects it in the enjoyment of these rights. The assertion and enforcement of this rule, which imposed severe restrictions upon the legislative power, has led to a radical change in the legislation of the various states,

and now it is the practice to insert in all laws authorizing the formation of corporations a clause reserving the right of the legislature to amend, alter or repeal such laws.

§ 276. **Dissolution of.**—The existence of a corporation may be determined: (1) By the expiration of the time limited for its duration. (2) By valid laws repealing the laws under which it was organized. (3) By voluntary dissolution or the abandonment of the purpose for which it was organized. (4) By a decree of forfeiture at the suit of the state for misuser or non-user of its powers and privileges.

CHAPTER XXIII.

SECURITY OF THE PERSON.

§ 277. **The right to life.**—Every one has a natural right to the security of his person and, stated generally, may treat any interference with his person as a wrong. The right to life is the first and greatest of all rights. It exists without law and is an inalienable right. No one can lawfully consent to the taking of his life by another, and no one can lawfully destroy his own life. It seems superfluous to say that whoever takes the life of another person is guilty of a legal wrong. But it is stated, for the purpose of indicating certain exceptions, the reasons for which are clear and well settled.

§ 278. **When life may be lawfully taken.**—The sovereign power may lawfully take the life of a person, by due process of law, as a punishment for crime.

In time of war or under martial law, it is justifiable or excusable to take the life: (1) Of enemies under arms. (2) Of non-combatants, who by their fault, expose themselves to the dangers of the conflict. (3) Of any persons who are guilty of grave offenses against the rules of war, such as spies, sleeping sentinels, deserters.

Where an alternative exists, as between two lives having equal rights, it being impossible that both

should live and it being necessary to make a choice in order to save either, it will be excusable to take one or the other life.

Where for self-protection or for the due enforcement of law it becomes necessary to take life, such taking is justifiable.

The unintentional taking of life will be deemed an inevitable accident and not a legal wrong, unless the act which results in such loss of life be for some other reason an unlawful act.

§ 279. **Remedies.**—It is obvious, from the nature of the case, that for an unlawful taking of life there can be no redress in favor of the person whose life is taken. And no preventive remedy is given that is effective. It is true, there is punishment by criminal prosecution, but that is deterrent only. There is also the proceeding by surety of the peace, but one who is not deterred by fear of indictment will have little restraint through a bond. The law does, however, give civil redress for the taking of life, in favor of persons standing in certain relations toward the deceased.

§ 280. **Recovery for injuries causing death.**—At common law there was no right of action in any one for the death of a human being. It was deemed repugnant to the law to attempt any estimate in a pecuniary way of the value of human life. For loss suffered between the date of an injury and the death, the person injured had a right of action, and any one entitled to his services might sue. But for the loss by the death there was no remedy. To supply this defect in the law, statutes have been passed. In this country they are substantially the same as

the English statute known as Lord Campbell's act. It is provided that whenever the death of a human being is caused by the wrongful act or default of another, the personal representative may maintain an action against the wrong-doer, and the damages recovered shall inure to certain persons having an interest in the life. While the various statutes do not entirely agree as to who shall be the beneficiaries, it is uniformly the law that unless some one or more persons of the classes named survive the deceased, nothing can be recovered. And the beneficiary must have some pecuniary interest in the life of the deceased, or reasonable expectation of benefit, and the damages recovered can not exceed such interest or benefit. The statutes limit the amount recoverable, in some states to $5,000, in others to $10,000. In some of the states the action must be brought in the name of the guardian or father, if the deceased was a child.

CHAPTER XXIV.

ASSAULT AND BATTERY.

For corporeal injuries less than the taking of human life, the law gives redress to the person injured. When the injury is direct and intentional, it is called an assault and battery. It is not essential, in order to constitute a wrong, that the wrong-doer shall have fully carried out his intention, nor that any actual damage shall result. An attempted injury may be an assault, and, though there be no damage actually suffered, the law presumes that there was some damage.

§ 281. **Assault defined.**—An assault is an attempt with unlawful force to inflict bodily injury upon another, accompanied with real or apparent ability to give effect to the attempt, if not prevented.

§ 282. **The ability and intent to injure.**—In a civil suit for assault, if the defendant had actual present ability and intent to injure, he is liable, regardless of whether the plaintiff believed there was such ability and intent. And even though the defendant did not have actual present ability, or did not have an intent to injure, he is nevertheless liable, if his conduct was such as reasonably created in plaintiff the belief that such ability and intent existed. However threatening an act would otherwise appear to be, it is not an assault, if from the words

or conduct accompanying the act it is apparent that no injury will be done. And mere words or threats do not of themselves constitute an assault.

§ 283. **Battery defined.**—Battery is any touching of another person with intent to injure or in an angry, revengeful, rude, insolent or hostile manner, and without his lawful consent.

§ 284. **The intent of the wrong-doer.**—For civil liability, it is not essential that there shall have been an actual intent to injure the plaintiff. It is sufficient if the act itself was unlawful or if it was intended to injure some person and unintentionally injured the plaintiff. The essence of the offense is that the defendant shall have been intentionally guilty of a wrong, and that plaintiff's person shall have been injured thereby.

§ 285. **Consent of the one injured.**—If the plaintiff consented to the defendant's act, the defendant is not liable for assault and battery, unless:

(1) The act be a breach of the peace.

(2) The plaintiff be legally incapable of giving consent.

(3) The consent be obtained by fraud.

(4) Force be used in excess of the consent.

§ 286. **Justification for battery.**—In time of war, or under martial law, acts that would be justifiable though they result in taking life, will of course be justifiable if they result in any less degree of injury.

Upon motives of public policy, wherever the law can not be otherwise adequately enforced, it is justifiable to use so much force as is necessary. An officer with authority to arrest may therefore use reasonable force to effect the arrest. For a like reason

any one, officer or private individual, may use reasonable force to prevent a breach of the peace, or, after a felony has been committed, to apprehend the felon.

For purposes of correction and punishment a reasonable degree of chastisement is justifiable by a parent upon his child, by a teacher upon the pupil, by a jailer upon his prisoner, and by a shipmaster upon his crew, and under some circumstances upon his passenger. An act that would otherwise be assault and battery may be justifiable where it is necessarily done for the purpose of saving the life, either of the person injured or of another.

Whenever the force used upon a justifiable occasion is of a degree that is unreasonable or excessive it becomes itself a wrong, and the person so using excessive force becomes liable for the excess, and in some states also loses the right to complain of the violence against him.

§ 287. **Self-defense.**—Any one may lawfully use force to protect himself against the unlawful force of others. But only so much force is justifiable as is reasonably necessary for protection. The degree of force that may be lawfully used by way of self-defense varies with the nature of the attack. If the person attacked has the belief upon reasonable grounds that his life is in danger, or that he will receive great bodily harm, he will be excused, though he kill his adversary. But out of regard for human life, the law does not permit one to kill his assailant unless there be such belief upon reasonable grounds. One is bound to retreat, if possible, and to confine his defense within reasonable limits. So, one at-

tacked by another with his fists, can not ordinarily justify the killing his assailant at once with a knife or other deadly weapon. The law does not, however, require one to retreat when in his own house. His house is said to be his castle, and he may stand, repelling any force with force, even though it become necessary to take the life of the assailant to repel the assault. Provocation by mere words is never an assault, and therefore will never excuse the use of force in retaliation.

The right of self-defense includes the right of one to protect persons standing in the following relations, husband and wife, parent or person *in loco parentis* and child, members of the same family and master and servant. The right of self-defense also exists in favor of one for the protection of his possessions and the possessions of those holding the above relations toward him. In order that a person may avail himself of the plea of self-defense, it is generally necessary that he shall have been free from fault in provoking the attack, for the law will not permit the right of self-defense to be used as a cloak for wrongdoing.

§ 288. **The remedies.**—The civil remedy for assault, or for assault and battery, is an action for damages. The injured person is entitled to recover damages for all the natural results of the injury that have been or probably will be suffered. Both mental and physical suffering, or impairment of faculties, the sense of shame and humiliation, the loss of social respect, actual and direct pecuniary loss, are elements to be considered in assessing the damages.

Where the offense is done with malice, or with deliberate intent to injure, exemplary or punitive damages may be recovered, unless the act is also punishable criminally, in which case such damages can not be recovered in a civil action.

CHAPTER XXV.

FALSE IMPRISONMENT.

§ 289. **Definition.**—It is every one's right to enjoy the freedom of his person, to go and come whenever and wherever he may lawfully do so. Any interference with this freedom may be a legal wrong. To forcibly compel one to go from a place or to forcibly prevent him from coming to a place will generally amount to and be actionable as an assault, battery, nuisance or trespass. Such an act will not, however, constitute an imprisonment.

False imprisonment is imposing by force or threats an unlawful restraint upon one's freedom of locomotion, or detaining one without legal authority.

§ 290. **The detention or restraint.**—There need not be an actual touching of the person. If the person submits upon command or threats, and believes he is under restraint, it is a sufficient imprisonment. The restraint must, however, be complete. If one is prevented from moving in one direction only it is not imprisonment, nor is it if he is prevented from moving in every direction except one. So long as there is any reasonable path known to be left open and free to him, a person can not be said to be imprisoned. But it is immaterial whether the boundaries of the imprisonment be large or small.

§ 291. **The unlawfulness of the restraint.**—To

constitute a legal wrong it is necessary that the imprisonment be unlawful. For determining what restraints are unlawful, the shorter inquiry is, what restraints does the law allow? All others will be legal wrongs.

Lawful restraint may be, 1st, without legal process; 2d, with legal process.

§ 292. **Lawful restraint without legal process.**— In some cases the law deems it less productive of mischief to allow a person by his own act to restrain another than to require him to resort to legal proceedings. The reason lies in the ineffectiveness of legal proceedings under the circumstances, and in the necessity for prompt action. Order and peace are better subserved by the individual act than by the tardy redress of legal proceedings.

A parent may impose restraint upon his child.

A teacher acting *in loco parentis* may restrain a pupil, subject, however, to the control of the parent.

A guardian of the person of a ward may exercise restraint.

A shipmaster may restrain members of his crew or passengers to preserve discipline and order.

Military officers, in time of war, may of course restrain the captured enemy, spies and any persons infringing the rules of war, or suspected of doing so. In time of peace they may impose restraint upon those who are under military control, for military offenses, but they may not restrain others.

One who is bail for another may generally, by following the procedure of the statute, himself arrest and restrain his principal.

Any person may restrain another who is dangerous from insanity or intoxication, but is bound without delay to surrender the dangerous person to the officers of the law.

A peace officer may without a warrant arrest and restrain a person:

(1) To prevent breach of the peace in his view.

(2) For a felony or misdemeanor if committed in his view, but not for a mere misdemeanor committed out of his view.

(3) For a past felony, provided he has reasonable grounds for believing the arrested person committed a felony. And he is justifiable, even though in fact the arrested person is innocent, or even though in fact no felony had been committed.

A private person may without legal proceedings arrest and restrain another:

(1) To prevent breach of the peace in his view.

(2) For a felony, whether past or in his view, provided a felony has been actually committed, and he has reasonable grounds for believing the person arrested to be guilty. He makes the arrest at his peril, however, and if no felony has been committed, he will be held liable.

Where the arrest and restraint is for a felony or misdemeanor, the person arrested must be taken before a magistrate within a reasonable time, or the imprisonment can not be justified. In all cases, the restraint exercised must be reasonable, and if it becomes excessive, the person restraining is guilty of a legal wrong. It is, however, doubted whether a parent can ever be civilly liable for damages to his

child, on account of an excessive restraint, although he may be criminally liable therefor.

§ 293. **Lawful restraint under legal process.**—After judgment of insanity, a warrant in proper form is a justification for the restraint of the insane person, even after the person be in fact restored to sanity. Judges within the limits of their jurisdiction are never civilly liable for causing the restraint of a person, even where they are guilty of error, or abuse of their power. This rule rests upon public policy, it being deemed safer that judges shall be free from any fear of private suit, and that redress be left wholly to the state. But where judges act wholly without jurisdiction, they are civilly liable to the person restrained, if they have acted knowingly and maliciously. Courts of limited jurisdiction are held to stricter accountability, and are bound to know and not to exceed the limits of their jurisdiction. So that while judges of general jurisdiction, acting without or beyond jurisdiction, are not liable so long as they act in good faith, judges of limited and inferior jurisdiction are liable for acts in excess of jurisdiction, whether in good faith or not.

§ 294. **Officers.**—Officers who make arrests upon legal process must, in order to justify such arrests, be able to show :

(1) That the process was issued by a court having jurisdiction of such cases.

(2) That there is nothing on the face of the process, apprising the officer that no authority existed in the particular case.

(3) That he acted reasonably, promptly and moderately, in the execution of the process.

All persons, whether parties or attorneys, who procure the issuance of illegal process, under which arrest is made, are liable to the person arrested. But the liability will not be on the ground of false imprisonment, except where the process procured is extra-judicial, or in other words is not valid process. If the process is valid, there is no liability for false imprisonment, even though the process be procured by a malicious and false statement of the facts. The remedy in the latter case is by an action for malicious prosecution, which will be considered hereafter.

§ 295. **Remedy.**—The person arrested may maintain an action for damages against the wrong-doer, and is entitled to recover all proximate damages. He may recover compensatory damages, and as elements of such damages the jury may consider all expenses reasonably incurred to procure discharge, including reasonable attorney's fees in the former proceeding, loss of time and employment, loss by interruption of business, bodily and mental suffering, the sense of shame and humiliation, the loss of or injury to honor, reputation and social position.

In addition to compensatory damages, the person illegally restrained may recover exemplary or punitive damages when the act was done maliciously or with undue violence. But exemplary damages can not be recovered when the act complained of is punishable criminally.

§ 296. **Privilege from arrest.**—Upon grounds of public policy the law declares persons under certain circumstances to be free from arrest.

Ambassadors and representatives of foreign powers are exempt from local jurisdiction, not only in

civil but criminal cases, the fiction being that they carry with them the territory and jurisdiction of their own countries. The exemption extends to the family, secretaries and servants of the foreign representative. But the privilege may be waived and local jurisdiction may be submitted to.

By the constitution of the United States and of the states members of the legislature are exempt from arrest, except for treason, felony or breach of the peace, while attending the sessions of the legislature, and for a reasonable time before and after, while going to or from the same.

Parties litigant, witnesses, attorneys, judges, jurors and other officers of court are exempt from arrest on civil process while attending in court, and while going to and from the same. In most states voters, while going to and from the polls, are privileged from civil arrest. In some states women are privileged from civil arrest.

§ 297. **Remedy for arrest of privileged persons.** —The privilege from arrest may always be waived by the privileged person. It follows, that the arrest is not wrongful until the person claims his privilege and applies for his discharge. This he may procure by application to the court issuing the process or by writ of *habeas corpus*. In some cases where the privilege is for the benefit of other persons, as in case of witnesses, any one interested may secure the discharge, or the court may act on its own motion.

CHAPTER XXVI.

MALICIOUS PROSECUTION.

§ 298. **Elements of the wrong.**—It is every man's legal right to be free from any unjust legal proceedings, and, strictly speaking, every suit or legal proceeding that fails is an infringement of that right. But it is not every unsuccessful suit that will give the person sued a right to recover damages therefor. The due enforcement of the law requires that honest litigants shall not be deterred by the fear of liability for malicious prosecution from asserting their claims civilly, nor from the praiseworthy work of bringing offenders to justice. Therefore the wrong from unfounded legal proceedings is through motives of public policy limited to such proceedings as are instituted maliciously and without probable cause therefor. Furthermore, the law does not favor the maintenance of a second action during the pendency of another in which precisely the same questions are involved. The proceeding complained of as a malicious prosecution may always result in a judgment against the party charged, and when such result follows, the judgment is generally a conclusive adjudication that there was sufficient cause for the proceeding. The law does not, therefore, permit an action for malicious prosecution until after the termination of the proceeding complained of, and this

termination must be other than by a valid judgment against the party charged, otherwise it might happen that a prosecuting witness would be held liable in damages for instituting a proceeding without probable cause, and afterward in the proceeding complained of the criminal might be convicted upon evidence beyond a reasonable doubt. Therefore, in order that a plaintiff may maintain an action for malicious prosecution, he must establish the concurrence of three things, 1st, the malicious motive; 2d, the absence of probable cause; 3d, the proceeding must have terminated. If he fails to establish any one of these three elements his action can not prevail.

§ 299. **The malicious motive.**—This does not necessarily mean hatred, ill-will or revenge. By malice here is meant any direct or indirect motive of wrong. It may be any motive other than that of simply bringing the supposed offender to justice. So, if the object of instituting criminal proceedings be shown to be to compel a person to pay a debt or to surrender property, there is malice in the legal sense. Malice may be inferred from the recklessness or gross negligence of failing to make proper investigation before beginning the proceeding. And it may be inferred from the entire absence of probable cause, without other evidence; for it is inconceivable that one can act with good faith in such a case, unless he has some probable cause. The question of the existence or non-existence of malice is one of fact for the jury, although it is the province of the court to decide whether there is any or sufficient evidence of malice.

§ 300. **Want of probable cause.**—Probable cause is the apparent existence of such facts and circumstances as would excite the belief in a reasonable mind that the person charged is guilty. It is essential that the prosecutor shall have entertained an honest belief in the guilt. Although there might otherwise be probable cause from suspicious circumstances, yet if the prosecutor knew or believed the accused to be innocent he would not have probable cause for making the charge. It matters not that facts actually existed which would amount to probable cause, such facts must be known to the prosecutor at the time of the prosecution in order to avail him. The mental attitude of the prosecutor is in such case one of the facts and circumstances to be considered, in determining whether he had probable cause. It is not enough, however, that the prosecutor entertained an honest belief in the guilt of the accused. Such belief must have been upon reasonable grounds, and mere floating rumors are not generally considered a sufficient foundation. It makes no difference that the accused was in fact innocent; the question is not as to the innocence of the accused, but whether there was probable cause for believing him to be guilty. Absence of probable cause can not generally be inferred from the mere fact that the proceeding was actuated by ill-will. There must be other evidence. For, a belief upon probable grounds, that the accused was guilty of offense, would almost inevitably excite an ill-will toward him, and hence the existence of ill-will is equally consistent with the presence as with the absence of probable cause. But where the malice consists in the

wrongful use of the legal proceedings for a collateral improper purpose, it is competent evidence of the absence of probable cause ; for such evidence would go to the question whether the prosecutor honestly believed the accused guilty. The fact that the prosecutor laid the facts and circumstances before counsel learned in the law, and acted upon the opinion given, is competent evidence, both of the absence of malice and the existence of probable cause, but is not conclusive. In order to afford protection, there must have been a full disclosure made to an attorney in regular practice. Of course, it must have been in good faith, for an attorney and client will not be permitted to use such a defense as a cloak for their collusive wrong.

A judgment of conviction in the proceeding complained of is generally conclusive evidence of the existence of probable cause, even though an appeal be taken, resulting in a new trial and subsequent acquittal. But if the conviction was secured by fraud or perjury, it will not be conclusive evidence.

An acquittal in the proceeding complained of is competent, but not conclusive evidence of the absence of probable cause. In defense to the action for malicious prosecution, it may be shown that the charge is true, notwithstanding the acquittal. For, an acquittal may have resulted from failure to establish the charge by evidence beyond a reasonable doubt, and yet the evidence may be sufficient to establish the charge by a preponderance.

§ 301. **Proceeding must have terminated.**—Generally such termination must have been otherwise than by a judgment against the person charged, but

it need not have been by a judgment in favor of the person charged. It is a sufficient termination if the grand jury ignores a bill, where a person has been bound over; or if a *nolle prosequi* be entered; or if an indictment be quashed; or if the accused be discharged from bail or imprisonment. All that is necessary is that the proceeding shall have been so disposed of that it can not be revived, and that the prosecutor, if he intend to proceed further, must begin anew.

§ 302. **Malicious prosecution of civil actions.**—The action is usually brought for the malicious prosecution of some criminal proceeding. But it is sometimes also allowed on account of civil suits upon the same principles.

At common law the action was permitted for any proceeding, civil as well as criminal, upon termination in favor of the defendant, but when by statute costs were given to the prevailing party, the right to maintain an action for malicious prosecution of civil suits was limited to such as involved the arrest of the person, the seizure of his property, or other such special injury. And this is the rule that prevails in many states, among which are New Jersey, Pennsylvania, Maryland, Iowa and Georgia. Other states have followed the common law as it existed prior to the statutes giving costs; among these are New York, Indiana, Vermont, Connecticut, Kentucky, Kansas, Illinois and Missouri.

§ 303. **Malicious abuse of process.**—It is not only for proceedings maliciously begun that the law affords redress, but also for any process, either civil or crim-

inal, though lawfully begun, if it is made use of for a purpose not justified by law. For example, a judgment may be lawfully recovered, but if after payment of the same, the creditor maliciously cause execution to be issued thereon and property to be seized, this is an abuse of process. Or, an execution may be lawfully issued, yet if an excessive levy be made thereon it is an abuse of process. It is generally necessary in order to sustain an action for abuse of process to prove both malice and want of probable cause, though if it be shown that the abuse was for the purpose of accomplishing some collateral wrongful purpose malice and want of probable cause may be inferred.

§ 304. **Remedy.**—The remedy for malicious prosecution is an action for damages, which may be brought against any one who commences or procures another to commence such prosecution. Public officers, however, who are charged with the duty of bringing such prosecutions, will be held liable only upon very clear proof of malice.

The damages recoverable may be for all expenses, including attorney's fees in the proceeding complained of, suffering mental and physical, loss of time and business, injury to property, injury to reputation and honor, and the loss of social position. Where the prosecution was with great malice or other aggravated circumstances, exemplary or punitive damages may be allowed in addition to the compensatory damages. By way of mitigation of the damages it may be shown that the plaintiff had a bad character, that his conduct was such as to arouse suspicion, that any

reasons for probable cause existed though insufficient to establish it; also anything that goes to rebut malice. But exemplary damages can not be recovered where the acts complained of are punishable criminally.

CHAPTER XXVII.

DEFAMATION.

§ 305. **The right to reputation.**—The theory upon which an action is given for defamation is that the person was entitled to a good reputation, that a false statement was maliciously made affecting the reputation, and that damages resulted therefrom. Although upon general principles the plaintiff is bound to affirmatively establish all of the elements constituting his cause of action, it would, in nearly all cases of defamation, be found highly inconvenient to enforce such principles strictly. For, the nature of the charge may be such that no evidence is attainable as to its truth or falsity; or, it may be impossible to expressly show the damage done; or, a stranger in the community, having acquired no reputation as yet, could prove no actual damage, and might be wholly unable to show how he would be actually damaged in the future. Taking into consideration these difficulties, and to the end that justice may not miscarry, the law aids the person defamed by making certain presumptions in his favor and throwing the burden upon the wrong-doer to produce evidence to justify or excuse himself. Therefore, in the absence of evidence, the law presumes:

1st. That every one has a good reputation.

2d. That every charge against reputation is false.

3d. That every false charge is maliciously made.

4th. Where injury would naturally result, that it has actually resulted.

§ 306. **Libel and slander.**—The law divides defamations into two classes. False defamatory words, if written and published, constitute libel; if published orally, slander. Libel is communicated through the medium of eyesight; slander through the medium of hearing. By reason of the permanent and deliberate character of libel, it is regarded as of a more aggravated nature than a mere slander, which may be spoken in heat and excitement, and may be more easily effaced from the memory of the hearers.

While there is much that is common to both libel and slander, there are some points in which they radically differ. It will be convenient to consider each separately, in so far as they are variant, and afterwards to note the principles common to both.

§ 307. **Slander.**—False defamatory words spoken of a person are actionable:

1st. Where they charge an indictable offense, which involves moral turpitude or would subject the person to an ignominious punishment.

2d. Where they charge a person with having a contagious or infectious disease, tending to exclude him from society.

3d. Where they are spoken of a person in the way of his office, trade or profession.

In these three classes, and no others, the law presumes without proof that the reputation has been injured. They are said to be *actionable per se*.

4th. This leaves a fourth class, in which the charge is such that damages can not be said to be

the usual and natural result, and therefore the law does not presume them, but requires the person injured to allege and prove the special damages suffered.

§ 308. Slander imputing crime.—It is necessary that the acts charged be such as are indictable. If not indictable, the charge is not actionable *per se* under this class, unless so declared to be by statute.

By ignominious punishment is meant any corporeal punishment; as death, whipping, or imprisonment. Punishment by fine only is not deemed ignominious. But if the penalty be in the alternative, by fine or imprisonment, the offense is punishable ignominiously.

What does and what does not involve moral turpitude, it is not easy to define. When the case arises, it is usually clear. It may be stated to be whatever is shocking to the moral sense of the community. Slander imputing such offense is actionable *per se*, even though the offense be punishable by fine only.

Where crime is charged, it is immaterial whether it be stated that the party has been punished for such crime, or that he is guilty and liable to be punished. If false, the charge is equally actionable *per se*.

Proper to be included in this class are certain charges which are declared by statute to be actionable *per se*, in the same manner as charges of crime. These are usually charges affecting the chastity of a woman, and charges of certain disgraceful acts by either a man or a woman. In some states the charge of unchastity against a man is also made actionable *per se*.

The imputation of crime need not be in language that technically describes the crime. It is sufficient

if the words were meant and understood to convey such imputation.

§ 309. **Slander imputing disease.**—The diseases intended by this class are such as are loathsome or involve moral disgrace. A charge that one has the small-pox is, however, not deemed to be actionable *per se*. It is essential that the disease be charged as existing at the time. If the statement be made in the past tense, it is not actionable *per se* under this class.

§ 310. **Slander affecting one in his office, profession or trade.**—It is essential that the occupation be one that is recognized by the law as legitimate, and that the slander touch one in the capacity of his occupation. Hence it is not actionable *per se* to say of a gambler that he cheats in cards. But it is actionable *per se* to say of an attorney that he disclosed professional communications; of a clergyman that he is a drunkard; of a physician that he is guilty of malpractice; of a judge that he takes bribes; of a mechanic that he is incompetent. It is also essential that the charge be made while the person is holding or pursuing the occupation. If made afterwards it is not actionable *per se*.

§ 311. **Slanders actionable only by reason of special damages.**—A satisfactory enumeration of such cases can not be made. Any defamatory words that produce actual damage may give a cause of action. The damages must, however, be such as are deemed to be the proximate result of the slander. If the damages are remote there is no cause of action. It is essential that the damages be pecuniary or material, such as the loss of a marriage, loss of employ-

ment, loss of profits, or injury to business. Mere mental anxiety and distress are not such damages as will support the action.

§ 312. **Slander of title.**—Analogous to slander of the person whereby special damages are suffered, is what is called slander of title, *i. e.*, false statements, either oral or written, with reference to a man's property or business whereby its value is diminished. If the language involves the reputation of the owner it may be actionable as slander of the person. But there are many cases in which only the property or business is affected. Such language is not in the strict sense slander or defamation at all, for these are concerned with reputation only. Inasmuch as in slander of title reputation is not involved, there is no aid given by the presumptions heretofore mentioned in plaintiff's favor. The plaintiff must establish by his evidence, 1st, that the words were false; 2d, that they caused injury to the title or property; 3d, that they were uttered maliciously; 4th, that plaintiff had the title or interest; 5th, that there was an absence of probable cause for using the words.

§ 313. **Libel.**—A libel need not necessarily be in writing or print. Any caricature, scandalous painting, drawing or effigy may constitute a libel. Any spoken charge that is actionable *per se* will if published in writing be a libel. Hence, it is libelous to charge in writing, crimes, diseases, or scandals affecting occupations. But libel goes further, its wider range being based upon the deliberate nature of the act, its permanent form, and the greater damage caused.

§ 314. **Definition.**—Any false and defamatory

printing, writing, sign, picture, representation or effigy, tending to expose any person to public hatred or ridicule, deprive him of the benefits of public confidence or social intercourse, or designed to blacken and vilify the memory of a deceased person and tending to scandalize and disgrace his relations and friends, is a libel.

It is not necessary to prove special damages in any action for libel. If there is a libel at all, it is a libel *per se*.

It is not necessary that the libelous language impute crime or even disgraceful conduct; it is sufficient if the person is rendered contemptible or ridiculous.

As to charges affecting one's occupation, or imputing diseases, it is not essential in libel that they be made in the present tense, as is the case in slander. To impute by libel past misconduct or past diseases may also be actionable.

§ 315. **Newspapers.**—The constitutional guaranty of freedom of the press is often misconstrued, and it is popularly supposed that newspapers by virtue of their public nature are not held to so strict accountability for libel as mere private individuals. The law recognizes no such distinction. Freedom of the press means that there shall be no censorship by those in authority. Any man is free to write or publish whatever he chooses of another, but subject to the legal consequences if the publication be defamatory. Newspaper and individual must defend upon the same legal grounds.

We pass now to the principles common to both libel and slander.

§ 316. **Publication.**—It is essential, in order to give an action for libel or slander, that the defamatory words shall have been published. By publication is meant communication to a third person. of the words be heard or read only by the person against whom they are directed, there is no liability; for his reputation, *i. e.*, the estimation in which he is held by others, is not thereby injured. And if such person repeat the words, or show the letter to others, he has no cause of action, for the publication was his own act. But it is not material that the author of a libel or slander shall have intended a publication; he is liable if in fact there was communication to third persons otherwise than by the act of the person defamed. So, if one shout a slander, he is not liable if no one hears or understands, but he is if there be a listener known or unknown to him. And so it is publication of a libel if, after the author has parted with possession of it, it is read by one whom he did not intend to read it. Where two persons composed a libel together and sent it to the plaintiff, it was held to be a publication, the part that each took being a publication in the hearing and knowledge of the other. Every repetition of a slander or libel is a fresh publication, and gives a cause of action.

The law regards communications between husband and wife as privileged, therefore communication by either to the other of defamatory matter against others is not deemed to be a publication. But if such communication be in the hearing or to the knowledge of a third person, there is a publication.

A slander or libel against either a husband or wife, if heard or read by the other, is a publication.

§ 317. **Construction.** — The general rule is that words are to be understood according to their plain and natural import, and when the language is clear and unambiguous the court will not, ordinarily, allow the meaning to be varied by testimony that the author intended or the hearers understood them in a different sense. For, ordinarily, the presence or absence of an intention to injure can not change the effect of the language; and, on the other hand, the fact that some persons misunderstood the language, ought not to determine its quality, good or bad. In the large majority of cases, however, there is room for question whether the language is to a greater or less degree injurious in its meaning. Wherever by reason of any local or provincial usage words have an unusual meaning, or wherever by reason of any special circumstances the language has a peculiar effect, the plaintiff may declare what such meaning or innuendo is, and such facts may be given in evidence and the language construed in the light of them. Such facts may be shown whether the result be to establish either an innocent or a harmful meaning. In cases where the language is ambiguous in any respect, the law has undergone some modifications. In the earlier actions the rule was that the words were to be construed in the most favorable sense, the theory being that such construction would suppress litigation. Later, it was held that words should be taken in an unfavorable sense, it being supposed that, by affording legal remedy, resort to personal violence for redress would be prevented. Still later

the well recognized rule was that the courts should affix to the words a plain and natural meaning. The modern rule, however, sustained by the weight of authority and founded in better reason, is that where there is any ambiguity in the language the words may be construed in the reasonable sense in which the hearers or readers actually understood them, and to that end the testimony of the hearers or readers is received, together with evidence of all the surrounding circumstances.

The meaning actually intended by the author is immaterial upon the question of liability, except so far as he may have made it apparent at the time. If his ambiguous language was intended harmlessly, but was reasonably understood in an injurious sense, he is responsible. And if the language is not defamatory and was not so taken, there is no injury, although the author desired and intended there should be.

§ 318. **Certainty.**—The rule of law is that there is no liability unless there is certainty, (1) as to the person charged, (2) as to the imputation made. The reference must be to some ascertained or ascertainable person, who must, of course, be the plaintiff. The person may be ascertained either from the language itself or from the surrounding circumstances which give peculiar point to the language. So, where the reference is to a class of individuals and not to any member, the circumstances may be such that the jury can determine which was meant. But to merely charge as to two witnesses who have testified contradictorily, "one of you two has committed

perjury," is not actionable, for it is not and can not be certainly applied to either.

The imputation made must be certain, or capable of being made certain. The words need not, however, be technically exact as a description of the charge. Any words that distinctly assume guilt in the party charged are sufficient. But it is not essential that the words be affirmative. They may be actionable where the form of the language is interrogative; and it is conceivable that a statement in the negative may be so worded or emphasized as to convey the meaning of an affirmative charge. In determining whether an imputation is certain, it is proper to consider not only the words, but all the surrounding circumstances that may give especial force to language used.

§ 319. **Malice.**—By most law writers and by the courts it is stated that malice is an essential ingredient of actions for libel or slander. But, as in cases for malicious prosecution, the term malice has a peculiar meaning. It is not synonymous with hatred or ill-will. Malice may in a legal sense exist, where in fact the defendant's real motive was to benefit the plaintiff. For example, where a newspaper publishes the fact that a defamatory charge has been made, and adds the comment that the publisher believes it to be false.

Malice is said to be either express or implied; and the distinction is clearly marked. Radically different principles control. As the equivalents of express and implied malice, the words, "malice in fact," and "malice in law," are also used.

Some confusion in the law has resulted from the

failure to keep the distinction clear. The courts have often used the word malice without qualification to express either meaning, and some decisions have therefore been misleading.

Malice in law or implied malice is such as the court infers without evidence of malice. The inference is made from the fact of the falsity of the charge, in accordance with the presumptions heretofore noted. This inference is not permitted by the law to be overcome by evidence that the motive was not in fact malicious. It can be overcome only by showing that the words complained of were published upon what is called a privileged occasion. On account of this inflexible rule of law, some text-writers have sought to establish the proposition that there is but one kind of malice, *i. e.*, express malice, or malice in fact, and that instead of holding that there is "malice in law" in certain cases, the courts should hold that in such cases malice is not essential. The results, however, are the same, and the courts have declined to adopt the nomenclature urged by these text-writers.

Express malice, or malice in fact, includes actual malice in its popular acceptation. As an eminent judge said, "It means a wrong feeling in a man's mind." Any indirect or dishonest motive which induces one to defame another may be malice. Gross negligence or wantonness in the disregard of other's rights may be sufficient evidence to warrant a finding that malice existed.

Actual malice may be shown by intrinsic evidence, viz., the kind of language used, its exaggerated character, the manner of its publication; or it may

be shown by extrinsic evidence, viz., by any facts not contained in the publication itself, as for instance, by other publications, subsequent repetitions, refusal to retract, the existence of an old grudge. Actual malice is always a question to be determined by the jury, and not by the court.

By reason of the presumptions in plaintiff's favor, above referred to, it results that the questions arising are usually as to the sufficiency of the facts to afford a defense. The defenses will now be considered.

§ 320. **Justification.**—In libel and slander this word means only that the charge made is true. The presumption being that a defamatory charge is false, the burden falls upon the defendant to prove, if he can, the truth of the charge. And the uniform rule is that if the defendant wishes to avail himself of this defense he must affirmatively plead it. This is called a plea or answer of justification. The defendant may always defend by showing the truth of the imputation, and the defense, if established, is complete; for, there can be no legal wrong of defamation by speaking the truth of anyone. Under a plea of justification, however, the defendant must show that not only the words but their meaning, as alleged, are true. If he disputes that the words mean what they are alleged to mean, he does not do so by way of justification, but to that extent by denial.

It is a principle peculiar to civil suits for libel and slander that where the defamatory charge is that crime has been committed, it is necessary, in order to sustain a plea of justification, to prove the truth of the charge by the same degree of proof that would be required to convict the party if under indictment

for the crime. In other words, justification of a charge of crime must be proven beyond a reasonable doubt. But if no crime is charged the justification may be established by a mere preponderance of evidence. These rules have been modified by statute in some states.

Where justification is the issue, it is wholly immaterial to the question of liability whether the defendant acted maliciously or not. If the charge is true, the defense is complete, even though there was gross malice; and if the charge is found not true, the defendant is not relieved from liability by the fact that he acted in good faith. The only effect of evidence as to defendant's motive in such case can be to enhance or diminish the amount of damages recovered.

§ 321. **Privilege.**—As has been said, the truth is a complete defense in libel and slander. Wherever truth is shown the action fails. The question now arises, when does the law excuse a defamatory charge that is false? Upon grounds of public policy, common convenience and the general welfare of society, there must be immunity upon certain occasions. Statements made upon such occasions are called privileged communications. They are divided into two classes and are said to be of either:

1st. Absolute privilege.

2d. Qualified privilege.

It is to be noted that the privilege attaches to the occasion, and not to the matter stated, for, if the same matter be afterward repeated upon an unprivileged occasion, it has no protection.

§ 322. **Absolute privilege.**—The occasions of absolute privilege are few, and the tendency of the

courts is to narrow rather than enlarge them. They rest upon the ground that it is advantageous to the public interests that persons on such occasions should not be fettered in their statements. The cases of absolute privilege fall under three heads:

1. Legislative proceedings.
2. Judicial proceedings.
3. Naval and military affairs.

§ 323. **Legislative proceedings.**—No member of either house of congress, or of either house of the state legislature, is in any way responsible in a court for anything he may say in such house. This rests upon the provisions common to the constitutions of the United States and several states that, "for any speech or debate in either house, they shall not be questioned in any other place." The privilege, however, is confined to the walls of the house, which includes its committee-rooms. If the member publish the speech to the world, he is liable as any other individual would be. The absolute privilege does not extend to inferior legislative bodies.

§ 324. **Judicial proceedings.**—Everything that a judge says on the bench, or a witness on the stand, or counsel in trying and arguing a cause, is absolutely privileged, so long as it is pertinent to the inquiry.

A judge of a court of general jurisdiction is free to say anything concerning a case, while the case is being tried, no matter what his knowledge or motive is, and whether the statement is relevant or not. But a judge of limited jurisdiction is not privileged, unless the statement be relevant to the matter in hand. A witness on the stand is not liable for

any statement he may make, whatever may be his knowledge or motive, provided such statement is drawn out by questions, or, if volunteered, is relevant or believed to be relevant to the case. For any irrelevant matter, if volunteered from a malicious motive, he may be held liable, and he may be held liable for any statements made while not on the stand, whether in or outside the court room.

Counsel in a cause may speak any words, however defamatory and false, and whatever may be their knowledge or motive, provided only that they are acting within their instructions and their remarks are pertinent to the case. They may draw any inference they wish from the evidence. But they may not recklessly assert anything of which they can give no evidence.

All pleadings, affidavits and papers in a cause are absolutely privileged. Even if matter be introduced that is irrelevant and scandalous, so that it is struck out by the court on motion, no action lies.

§ 325. **Naval and military matters.**—All reports by a naval or military officer to his superior, and all testimony or argument in a court-martial, are absolutely privileged. In all cases of absolute privilege, the question is only whether the defendant has brought himself within it. If he has not, he is liable as any other person would be; if he has, then the question of his malice is wholly immaterial.

§ 326. **Qualified privilege.**—It is an essential element of all qualified privileges, that the communication under it be made in good faith. No person is allowed to take advantage of qualified privilege to vent his malice.

Whenever it is shown that the language complained of was uttered upon a privileged occasion, the law ceases to presume the existence of malice, and requires proof that there was actual malice. As it is expressed, the privileged occasion rebuts implied malice. It then becomes incumbent upon the plaintiff to prove that the defendant was actuated by express malice—malice in fact; and unless in such case the plaintiff does establish the existence of malice in fact his action fails. Whether a privilege exists is always a question of law for the court; whether the defendant was actuated by the proper motive is left to the jury.

In all cases of qualified privilege it is conclusive evidence of actual malice to prove that the defendant knew the charge to be false. For it is inconceivable that a man can have an innocent motive in uttering a defamatory charge that he knows to be false.

Cases of qualified privilege may be grouped under three heads:

1. Communications made in matters of public interest and general concern.

2. Communications made to persons to whom the defendant owes a duty to make communication.

3. Communications made in self-defense.

§ 327. **Matters of public interest and concern.**—Anything that is of general concern to the inhabitants of a town, city or community is what is intended. Though the matter be of only a local interest the rule applies, so long as the matter is not merely of private concern. All public institutions and their management, all public entertainments, published books,

pictures publicly exhibited, the architecture of public buildings may be freely criticised. All appeals to the public are subject to honest criticism and the critic will not be liable for false statements made. Whoever seeks notoriety or invites public attention challenges public criticism and must bear the burden of honestly made statements, even though they may be erroneous. All public officials, and candidates for office, may be freely criticised, provided the criticism be made in good faith.

But whenever matters of general concern are commented upon, the speaker or writer is bound to confine himself to what is of public nature. If this limit is transcended and private matters or private character touched upon, no privilege can be claimed therefor. For instance, though the official acts of an officer may in good faith be commented upon, by reason or by ridicule, even though the statements be in fact false and injurious, yet if the critic should go beyond the public matter, and falsely accuse the officer of a crime, it would affect him privately, and no protection would be given.

Reports of judicial proceedings are upon matters of public interest. Every fair and accurate report of judicial proceedings is privileged, though false defamatory matter be contained in it. The privilege does not attach, however, where the publication is prohibited by the court, or where the matter is obscene; for in such case the publisher is guilty of wrong in the very fact of publishing, and will not be permitted to avail himself of a legal protection for such wrong. The report to be privileged must be substantially a fair account of what actually took

place in court. The reporter may not, however, select damaging parts and omit the beneficial parts; and he has no privilege to comment on the evidence and give his opinion of it. Indeed, if he mixes up comment with what would otherwise be a fair report, the privilege is lost for the whole article.

Fair and accurate reports of proceedings of the legislature stand upon the same footing, and are subject to the same limitations, as in case of judicial proceedings. No other reports are privileged. No privilege can be claimed for reports of the doings of municipal legislatures, public meetings, political meetings, or stockholders' meetings.

§ 328. **Communications made under duty.**—There is no liability for honest mistakes, where an employer is asked to give a statement regarding the character of a servant. But there is no protection given, if the false statement be made from an improper motive, or if made recklessly and wantonly. There is no privilege for officious intermeddling, as where no inquiry has been made, or where there is no duty to speak.

Answers made in good faith to inquiries about persons with whom business dealings are contemplated are protected even though they turn out to be false. Hence, reports of mercantile agencies to their customers are privileged, if made in good faith.

So, inquiries by and answers to one interested in discovering a wrong-doer, are privileged. Any relation of confidence is sufficient to raise a duty to make communications, and if they are made in good faith they are privileged. The following relations have been held to be of the privileged character:

Husband and wife, father and child, brothers and sisters, guardian and ward, master and servant, principal and agent, landlord and tenant, lawyer and client, partners, and in one case it was held that intimate friendship might be a sufficient ground.

§ 329. **Communications in self-defense.**—If the statement complained of be one which has been invited or requested by the plaintiff, it is privileged, even though false, provided it be made in good faith. For example, if the defendant had previously made the statement under a privilege, and the plaintiff demands an explanation in the presence of strangers, or if defamatory words had been said by the defendant to the plaintiff alone, and plaintiff afterwards bring a stranger and demand whether defendant had used the defamatory words, such subsequent statements are deemed to be made in self-defense and are privileged if in good faith.

§ 330. **The remedy.**—The civil remedy for libel or slander is an action for damages. The courts will not interfere by injunction to restrain the publication of a libel or slander, for the reason that it must first be established before a jury whether the matter is or is not actionable. But after a verdict for the plaintiff, a court of equity may enjoin the subsequent repetitions of the defamatory matter.

§ 331. **The damages.**—Considered from the point of view of the jury, the damages awarded may be:

1st. Contemptuous, as where the defendant has been technically guilty of defamation, but the jury think the plaintiff greatly in fault, and therefore assess the damages at a nominal sum.

2d. Substantial or compensatory, where the jury

aims to arrive at the actual injury suffered by the plaintiff.

3d. Exemplary or punitive, where the jury seek to express their sense of the defendant's harsh and malicious conduct by fining him in an amount beyond the compensatory damages.

Considered from the judge's point of view the damages assessed may be either:

1st. General damages, viz., the natural and probable consequences of the false charge, which are presumed by the law without evidence in all cases where the words are actionable *per se*.

2d. Special damages, viz., such as the law will not infer, but requires to be established by evidence.

Wherever general damages are recoverable, special damages may also be recovered if specially pleaded and proven. Where a charge is not actionable *per se*, there is no cause of action unless the special damages be alleged and proven, and the recovery is limited to such special damages.

The amount recoverable by the plaintiff as compensatory damages may be larger or smaller according to the evidence. Whatever goes to show the greater extent of the injury is said to be in aggravation of damages; whatever goes to show the less extent of the injury is said to be in mitigation of damages.

By way of aggravation, evidence may be received of the social position and influence of both plaintiff and defendant and their pecuniary circumstances so far as the same may bear upon the influence exerted by the charge, the publicity of the charge, the fact that it was wholly unprovoked, and by some courts it is

held that an unsuccessful plea of justification may be considered in aggravation, though such is not the general rule.

By way of mitigation of damages, evidence may be received that the words were spoken in passion or excitement provoked by plaintiff, and hence all the injury is not attributable to defendant's fault; that the defendant had no actual malice, was insane or drunk, so far as the same may have appeared at the time of the defamation, and so have caused the wrong to have a less injurious effect; that plaintiff's character was bad, or that general rumors existed that he was guilty; that the defendant has made ample retraction. While the fact that others had previously published the same defamatory matter is not in itself admissible in mitigation, yet the defendant ought not to be held liable for any injury not resulting from his act, and it seems that evidence of previous publication by others will be received, if it can be shown that part of the injury claimed by plaintiff was in fact caused by such other publications and not by the defendant's act. Whether upon a plea of justification only, any evidence in mitigation may be given has been a disputed question, but the weight of authority is that such evidence may be admissible, whatever the issue.

Exemplary or punitive damages are based upon the mental attitude of the wrong-doer, and are by way of rebuke or punishment for his malice. They may be given on account of the violent or exaggerated character of the charge as showing deliberate malice. Evidence may be received of previous

transactions that indicate malice in the case at bar; of recklessness in uttering the false statement; of the publicity and repetitions of the charge, as showing unusual malice; of a refusal to listen to explanations, or after explanation to make retraction. It is the uniform rule, however, that exemplary damages can not be allowed where the defamation is punishable criminally. Hence, where libel is an indictable offense, evidence of the defendant's actual motive, malicious or otherwise, is not properly admissible, except so far as it can be shown to have affected the actual injury.

It is to be noted that in slanders of the fourth class, *i. e.*, those actionable only by reason of special damages, the plaintiff is confined to such actual injury as he alleges and proves, and since exemplary damages are not based upon actual injury, it follows that in cases of slander not actionable *per se*, no exemplary damages can be recovered.

CHAPTER XXVIII.

WRONGS TO CIVIL AND POLITICAL RIGHTS.

§ 332. **General nature.**—In a large sense every right is a civil or political right. The right to be free from assault is one phase of the civil right to life, liberty and the pursuit of happiness. So of the right to reputation and personal freedom.

It is now intended, however, to cover such civil rights as every person has in a public way—rights in and toward the community. Many of these will be found to be rights of imperfect obligation, in so far as the law does not undertake to redress infringements upon them.

It may be stated as a general rule that all such rights are held subject to the control of the sovereign power, and by that power may be curtailed or enlarged. Many are protected by the constitution and can be affected only by amendment of the constitution. Others are subject to modification from time to time by legislative enactment. For any alterations of rights by the sovereign power or by its representatives within their authority, it is clear that there can be no remedy.

§ 333. **The right of suffrage.**—Every qualified voter has the right to cast his vote and have it duly counted. He may be deprived of that right in a

number of ways, by force or by misconduct of officers or other voters. It is only for a small part of the wrongs in this matter that the law gives a private right of action. Where officers have neglected or refused to perform the preliminaries, so that votes can not be honestly and lawfully counted, the principal injury is not to any individual, but to the community. The loss is general, not special. So, also, where the officers have received illegal votes, it is the general injury to the community, rather than the injury to any individual that is involved. In such cases the law gives no action in favor of private persons, but leaves the wrong-doer to be punished under criminal process. There may be conduct, however, by which the principal and direct injury is to the individual, though there is present also a public injury, as where by force or threats one is kept away from the polling place, or prevented from casting his vote, or where the officers willfully and maliciously refuse to permit one to cast his lawful ballot, or where the officers wrongfully invade the voter's right to secrecy of the ballot. In such cases the law permits the injured voter to recover in an action for damages against the wrong-doer.

§ 334. **The right to assemble.**—The right of citizens to assemble in a peaceable manner to consult for their common good is a political right that is generally secured by the constitutions of the states. Whoever prevents any citizen from exercising this right may be held guilty of a wrong. If force is used, the remedy may be an action for assault, battery or false imprisonment, in which the deprivation of the right will enter as an element of damages.

But the wrong may consist in merely obstructing one from entering the meeting, and though such act may not amount to a battery or imprisonment, yet the law will afford redress by an action for damages.

§ 335. **The right to bear arms.**—This right is guaranteed by federal and state constitutions to every citizen. As used in the constitutions the word "arms" has the military sense and refers to such weapons as are suitable for the general defense of the community, and does not include such weapons as are peculiarly adapted to individual encounters. Therefore it would not be unconstitutional to prohibit the carrying of such weapons as the slungshot. The constitution does not forbid the passage of laws against carrying weapons concealed or against carrying weapons openly with intent to use them unlawfully.

It is evident that the invasion of this right must always be at the hands of the state, and accordingly there can be no recovery of damages in favor of one injured. His remedy must be to have the statute declared unconstitutional.

§ 336. **Freedom of speech and of the press.**—The constitutions of the United States and of the several states prohibit the enactment of any laws restricting the right to speak, write or print freely on any subject. The intent of these provisions is to forbid censorship or control by persons who exercise the power of the state. Freedom of speech or press is not thereby enlarged, but only protected against invasion. There is no unlimited freedom of speech or press. The right must be exercised subject to the bounds fixed by law. Liberty of the press consists in

printing without any previous license, but subject to the consequences of law.

The right of free speech and press does not warrant a man's using blasphemous, obscene or seditious language. Legislation directed against such speaking, writing or printing is uniformly held to be constitutional. The user of such language may be punishable criminally, and when the language is part of some civil wrong, it may be a valid ground for increasing the amount recovered in a civil suit. Where the direct and natural consequence of such language is to cause injury, the user may sometimes be held liable for the consequences, criminally or civilly.

No man may abuse the right of free speech or free press, by slandering or libeling another. The cases where one is not held responsible in damages for false statements, spoken or written, have been shown in the sections relating to privileged communication under the subject of libel and slander.

§ 337. **The right to office.**—The right to enjoy an office, to which one has been duly elected, may be violated by any one who excludes such officer therefrom, and the law will afford redress not only by ousting the wrong-doer, but also by giving damages against him for his wrongful act.

§ 338. **Religious liberty.**—The right to the complete enjoyment of religious freedom is subject only to the sovereign power of the state. This power can be exercised in restraint only so far as the public good may require, taking into consideration the circumstances of the people and the general moral sense. Within this limit the legislature may impose

restrictions. Therefore it may prohibit sacrifices of human beings or animals, may prohibit polygamy or any other immoral practice. These are not strictly invasions of the right.

The right may, however, be invaded by individuals in any of the ways that the exercise of political rights may be invaded, and the law will afford redress by an action for damages. It frequently happens, as in the case of political rights, that the violation of religious liberty is incidental to some wrong that is actionable upon other grounds.

§ 339. **The right to an education.**—Where the state makes provision for education it is bound to do so upon equal terms to all citizens. The citizen has then a civil right to the benefits. Whoever violates this right by wrongfully depriving another of such educational privileges may be liable in an action for damages. And if the wrong be by the act of an officer charged with the duty of furnishing such privileges, there may, in many cases, be a remedy by mandamus.

§ 340. **Unlawful searches.**—The right to be protected against unlawful searches is secured by the constitutions. Every citizen is entitled to maintain the privacy and secrecy of his home and business, whatever may be his reason for doing so. Whoever invades this right by a search that is not provided for by law may be liable therefor in damages, and where a search is made under legal process, if the process be used for a wrongful purpose, or if acts be done in excess of its authority, the wrong-doer may be held liable in an action for abuse of process or other appropriate action.

§ 341. **Performance of official duties.**—Wherever the law clothes one or more persons with power and imposes the duty to do certain acts, the corresponding right exists in the public or in individuals to have that duty correctly and honestly performed. The duty may be violated either through mere honest error, or through malicious and corrupt motives. But it is not for every such violation that the law gives a remedy, and for some violations the only remedy is in an action by the state, by mandamus or prohibition, by indictment or by impeachment.

In order to determine what, if any, remedy exists, the act in question must be submitted to several tests.

One test is whether the act was within or in excess of the authority conferred. If within authority the officer is generally protected, if in excess he may not be.

Another test is whether the act in question be one that involves the exercise of judgment or discretion as to the manner and propriety of doing it, or whether it is merely ministerial, *i. e.*, the manner and propriety of its performance is precisely fixed by law. For acts of the discretionary kind the officer generally enjoys immunity from suit; for acts that are merely ministerial, he may be held responsible in legal proceedings.

Still another test lies in the effect of the act in question. Every violation of official duty is in some sense an injury to both the public, as a whole, and to every individual of the community. There are, however, some official duties that are imposed primarily for the public benefit, and that affect individuals only incidentally; and again there are duties

that are imposed primarily for individual benefit, though they may also have an incidental public effect. For example, on the one hand, embezzlement of public funds by an officer; on the other hand, refusal by a sheriff to execute a lawful civil writ. In the former case there is no private right of action, but the remedy is confined to the state; in the latter case, the one specially injured may generally have redress.

It will be of advantage to consider more in detail the acts of various official bodies and persons, in order to ascertain the quality of the acts, and the remedies, if any, that are given.

§ 342. **Duties of the legislature.**—It is obvious that all of the legislature's acts are governmental and discretionary. In their nature, its powers are exercised primarily for the public benefit and only secondarily for private benefit. The legislature as a body can have no ministerial duties to perform. Hence, even though the majority or all of the legislators may in a special instance have acted from malicious and corrupt motives, whereby injury has been caused to an individual, there can be no remedy by private suit.

Subordinate legislative bodies, however, such as municipal councils, are subject to inquiry in the courts at the suit of individuals, in so far as they act corruptly. Such subordinate bodies may furthermore have duties to perform that are merely ministerial; for example, keeping streets in repair. For the wrongful performance or non-performance of such duties, if primarily for individual benefit, they may be held liable at the suit of one specially injured.

Acts of the legislature in excess of its authority are void, and will be so declared by the courts. Acts of subordinate legislative bodies in excess of authority will not only be declared void, but where special injury has resulted therefrom to an individual, he may have redress.

§ 343. **Executive and administrative duties.**— The executive power of the United States is vested in the president, and of the several states in the governors. In the exercise of their respective executive functions, they are not responsible to the courts, upon the fundamental principle that the three coordinate branches of the government must be independent of each other's control. So long as an act is within the executive power, it can not be reviewed by the courts, no matter whether the motive be malicious and corrupt, and whether it causes special injury to an individual. The only remedy, if any there be, would be by way of impeachment.

Inferior officers charged with duties to carry into effect the laws are usually called administrative officers. The protection to such officers acting within their powers extends only to their errors. If such an officer acts corruptly or maliciously, he may be held liable to civil suit by an individual injured.

Any executive or administrative officer may be charged with the performance of duties that are merely ministerial. As to such duties, the officer is subject to the control of the courts by the writ of mandamus, or may be held liable for damages to an individual specially injured.

Whenever an officer acts in excess of his authority,

he to that extent incurs all the responsibility of an individual.

§ 344. **Judicial duties.**—Judicial acts necessarily involve the exercise of judgment or discretion. For such acts there is complete and absolute immunity from civil suits. So long as they act within their jurisdiction, judges can not be held liable civilly, however gross the error may be, or however corrupt and malicious the motive that inspires the act. This is now the well settled law, older cases affirming a contrary doctrine having been overruled. The rule applies with equal force to courts of special and limited jurisdiction, as to those of superior and general jurisdiction.

The strong reason upon which the rule rests is in public policy. It is deemed more advantageous to the public that judges shall be wholly free from fear of private suit. The frailty of human nature is such that an honest litigant, firmly convinced of the justice of his cause, is prone upon an adverse decision to believe that the judge can not have acted with pure motives. The decision must always be against one party or the other, and if it were permitted to sue a judge for a corrupt decision, every honest judge might be hampered by the fear of suits brought by those who feel aggrieved at his decisions. Such a fear would to a greater or less extent necessarily impair the efficiency of the judges. It is therefore deemed best to clothe the judge while acting within his jurisdiction with complete immunity from private suits, and to leave the remedy in the hands of the state only.

By the phrase, "having jurisdiction," is not

meant merely the having jurisdiction of the special case before the court, but the having jurisdiction of that class of cases. From this results a distinction between courts of general jurisdiction and those of limited jurisdiction. The former have as a part of their jurisdiction the right to determine whether the special case before them comes within their general jurisdiction, the latter have the limits of their jurisdiction fixed with precision, and are bound to confine themselves within such limits. In the former case the judge can not be held liable for mere error, but may be liable if he acted maliciously and corruptly with knowledge that he had not jurisdiction; in the latter case the judge may be held liable for his error, as well as for malice and corruption.

Judicial officers often have imposed upon them duties which are merely ministerial. As to such they do not act judicially. For example, after a bill of exceptions has been settled, the signing of it by the judge is a ministerial act and may be enforced by mandamus. It is a general rule that for failure to perform ministerial acts, judges are liable the same as other ministerial officers.

§ 345. **Public duties by private persons.**—There is a class of duties that are assumed by private persons or corporations, in consideration of the grant to them of certain privileges at the hands of the state. These duties are generally, if not wholly, for the primary benefit of individuals of the community, rather than for the benefit of the public as a whole. Among these are the duties of common carriers, innkeepers, water companies and gas companies. Such persons or corporations are bound to permit the en-

joyment of their privileges to all individuals of the community upon impartial regulations, and for a violation of such impartiality they may be held liable at the suit of an individual specially injured. Where, as in case of railroads, water and gas companies, valuable public rights have been granted to the person or corporation, the courts may sometimes compel by mandamus the performance of the public duty. There is, however, a margin of discretion within which there may be discrimination. For example, a common carrier or innkeeper may exclude a person who is dangerous, or offensive to the sense of decency of others. Separate accommodations may be lawfully maintained for women and for men.

§ 346. **The right to own property.**—Upon this fundamental right belonging to every citizen depends the security and well-being of the community. Without it the social system, as now organized, could not be maintained. Obviously there is nothing that a private person can do to infringe upon this right. The only question is how far may the state impose valid limitations upon it.

So far as its own creatures are concerned, viz., corporations, it may, by the creating act or in pursuance of power therein reserved, make any limitations that it chooses as to the right to own property or may withhold such right altogether.

As to individual citizens, the state has no power to diminish this right, except only where, in the exercise of what is called the police power, it does so for the public benefit. Hence it is valid for the legislature to declare that there may be no ownership of

devices to be used for gambling or other immoral purposes.

§ 347. **The right to make contracts.**—This, like the right to own property, is a fundamental one and the law aims to protect it to the fullest degree consistent with good order and morals. It is, however, subject to the power of the state. The state may by general statutes adopt valid regulations for and even prohibit certain classes of contracts. By the statute of frauds it renders certain classes of contracts unenforceable. It may prohibit the employment of infants in certain kinds of business; it may deny the power to infants or married women to make contracts; it may prohibit women from engaging in the saloon business or from being employed therein. For such legislation, if constitutional, there can be redress. If unconstitutional the only redress is to have the statute so declared by the court.

If individuals impair this right, the law affords remedy by civil suit and sometimes by a criminal prosecution.

Whoever, by any wrongful act prevents another from engaging in business or making contracts may be held liable for the wrong to the person thereby injured. Generally these wrongs are incidental to an act that is a wrong upon other grounds; as libel, slander, assault and battery, or imprisonment; and in such cases the wrong will be remediable upon such other grounds, the injury to the right to do business or to contract being considered by way of increasing damages.

§ 348. **The right to labor and employ labor, and the right to engage in business.**—This class, under the

right to make contracts, is peculiarly liable to violation by individuals through wrongs that are not remediable upon other independent grounds, and a separate consideration is therefore proper. As has been heretofore stated, mere threats by one individual against another are not actionable civilly. The reason is, not that they are not wrong, but that the injury is ordinarily so inconsiderable that the law will not concern itself with giving a remedy. That threats are nevertheless a wrong is shown by the fact that in an assault and battery proof of them may be given to show a plaintiff to have been the aggressor, and thereby diminish damages, and by the fact that where one through threats has accomplished a purpose he could not have otherwise accomplished, such threats constitute a principal element of the wrong. Threats may make an act unlawful that without them might be innocent. Whenever they are used so as to effect greater injury than would occur when they are mere threats between man and man, they may become actionable.

The right to labor and employ labor, and the right to engage in any business, is often interfered with, through the combinations of individuals. This may be by strikes, lockouts or other concerted action. The question is, when are such combinations lawful or unlawful. The purposes of such combination may be (1) to prevent an employer from hiring whom he pleases, (2) to prevent a laborer from hiring to whom he pleases, (3) to prevent a laborer from working at certain kinds of employment, (4) to prevent a business man from engaging in a certain business; or the purpose may be the reverse of each.

The principle is the same in all and the law in relation to strikes will be illustrative.

§ 349. **Strikes.**—Under the early English decisions the rule was that though any one was entitled to quit service when he pleased, yet if two or more agreed that they would quit together such agreement would be a legal wrong. It was called a criminal conspiracy. Some of the early American cases adopted these decisions as the law. With the progress of society, the rule has been greatly modified and made more liberal in favor of those combining. It is now the law that workmen may as a body agree not to work except on certain conditions, and in pursuance of such agreement may quit service and they will not be guilty of an unlawful act, so long as they confine themselves to peaceable methods. It seems, however, by some late federal decisions, that if the quitting necessarily involves the breach of contract, or if the time of quitting be fixed so as to cause the greatest damage, a combination to that end may be unlawful.

The means used must at all events be peaceable. As soon as threats, menaces and intimidation enter into the methods of the combination, there is an actionable wrong, and all the participators may be subject to civil as well as criminal liability for conspiracy.

§ 350. **The remedy.**—Wherever it is shown that an unlawful conspiracy exists, a civil action is maintainable against the wrong-doers, and the injuries sustained are recoverable as damages.

More effective and prompt remedy, however, is by the writ of injunction.

CHAPTER XXIX.

FRAUD.

§ 351. **Kinds of fraud.**—It is every one's right to have others exercise good faith toward him and to refrain from violating the trust and confidence that he may place in them. The social fabric rests upon the maintenance of this right. It is evidently impracticable, however, for the law to enforce perfectly honest and fair dealing under all circumstances. The inquiry must be, how far does the law take cognizance of or undertake to remedy violations? This is the subject of frauds and deceptions.

Wrongs of this kind may exist where the parties are not upon terms of equality, and the injured person is by reason of some special relation entitled to repose more than usual confidence in the wrong-doer. Or such wrongs may be where the parties do not occupy any special relation toward each other. As to both classes, the wrong may consist in either affirmative conduct, as where one makes a false statement misleading another, or in negative conduct, as where one who ought to speak is silent.

§ 352. **Frauds in confidential relations.**—Where parties are upon any special terms of relationship under which one is entitled to place peculiar reliance upon the other, the law will closely scrutinize transactions between them, and may hold any violation of

confidence to be a legal wrong. Some of these relations will be separately considered. The principles are analogous in all.

§ 353. **Husband and wife.**—To this, the most confidential of all relations, the law gives a jealous protection. Communications between husband and wife are held sacred, and no matter how great may be the interests that seem to demand it, the law will not compel a disclosure. Nevertheless, as between themselves, no legal remedy is given for a violation of such confidences. For it is deemed better policy to leave the observance of confidences between husband and wife to their own sense of what is proper. Any attempt at legal redress would probably cause greater evils than it would cure.

So far as concerns dealings between husband and wife in relation to their property interests, it is evident that they must always, to a greater or less degree, be affected by the influence of the marriage relation. While the law recognizes with approval a reasonable use of such influence, no unfair use of it will be permitted. As a rule, the man being the stronger and more experienced in business affairs, there is less reason to suspect an undue controlling influence on the part of the wife. On the other hand, a husband is presumed to have a great influence and control; so that, in any transactions as to the wife's property, the law will examine most closely, and if there be found any evidence whatever of unfairness or bad faith, relief will be granted.

§ 354. **Parties engaged to marry.**—This relation establishes a confidence which, though not of so high a degree as marriage, may be the basis for accom-

plishing a wrong. The confidence is such as will quiet any apprehension of fraudulent practices.

If a man, who is incapacitated to marry, as by having already a wife, or having negro blood, should engage himself to marry a woman, and should induce her to consummate a supposed marriage, he would be liable in damages to her. It would not be necessary to show any active misstatement or deception. The relation of confidence precludes the necessity of any inquiry by the woman. And if, under a promise of marriage which he does not intend to fulfill, a man accomplishes the seduction of a woman, damages are given on account of the breach of trust.

Where there is an engagement to marry, the parties are each entitled to take into consideration the pecuniary circumstances of the other. If one thereupon should make a secret conveyance of property, so that the marriage is of less pecuniary benefit to the other, there is a right of action for such fraudulent practice.

And if, while under engagement to marry, one should use the relation of confidence for the purpose of obtaining the other's property, the law affords redress in an action for damages or to recover the property.

§ 355. **Parties having illegal sexual relations.**— Although persons living in illegal sexual relations are both in the wrong, and although no contract will be enforced which has for its consideration such relation, nevertheless the law recognizes that there is under such circumstances an opportunity for one to take undue advantage of the other, through misuse of confidence reposed. Business transactions

between such persons are open to suspicion, and unless the party benefited shows that no advantage was taken, the law will afford a remedy, either by restoring to the injured party what was lost, or by giving damages.

§ 356. **Parent and child.**—Inasmuch as an infant's dealings with his property are voidable, a parent can not acquire any advantage through his influence over the infant. The transaction would be invalid, simply from want of power in the infant. But after maturity of the child, there may still be an influence by the parent, and if such influence and relation of confidence be used to obtain an undue advantage in any transaction between the parent and child, the child may have redress by appeal to the courts. Such relation of confidence may also exist in favor of the parent in old age, and he will be protected in a similar way against the machinations of his mature offspring.

§ 357. **Trustees.**—The relation of trustee may be created either by the party himself, or by some individual for his benefit, or by judicial action. Executors and administrators, guardians, assignees, receivers, partners, agents for sale of property, and the like, are all trustees as much as if they were expressly so named. In every case the trustee is selected on account of confidence reposed in him; and the law requires of the trustee perfect good faith and integrity in the discharge of his obligations. It is an elementary principle that a trustee is permitted to do nothing whereby he personally reaps an advantage to the detriment of his trust. Hence, whenever he deals with his beneficiary, the transaction will be deemed

fraudulent, unless he shows that he made full disclosure of all matters that he knew or ought to know, and that the transaction was in fact a fair one. It is necessary that he shall have put the beneficiary on terms of perfect equality with him. Whenever a trustee sells property of the trust, or makes contracts in relation thereto, he is not permitted either directly or indirectly to make a profit to himself. He can not, either himself or through a third person, become the purchaser at his sale, without being held guilty of fraud. The beneficiary has the option to declare the sale void, or to affirm it, if he deem it to his advantage.

In cases where the confidential relation is of such a character that its influence can be supposed to continue after the relation has in fact terminated, subsequent dealings between the parties may be held to be not on equal terms, and for any misuse of the influence, the court may declare the transactions fraudulent.

§ 358. **Principal and agent.** — The relation of principal and agent is one of trust. The agent is bound to the same degree of fidelity and good faith as any other trustee. There are, however, certain additional obligations in this relation, owing to the fact that both principal and agent have reciprocal duties to perform, whereas the ordinary relation of trustee and beneficiary calls for performance of duties by the trustee only. The principal owes the duty to the agent not to lead him into danger or loss. For instance, a master is liable if he subjects his servant to unknown risks in machinery or buildings, and a principal is liable if he causes his agent innocently to

do a wrong to another and thereby incur loss. These and the like may amount to frauds upon the servants or agents.

§ 359. **Partners.**—Partners are in some respects trustees for each other. They can not make profit to themselves individually at the expense of the partnership, and are bound to make full disclosures to each other. In some respects a partner acts as agent for the partnership, and there exist between him and his partners the reciprocal duties of principal and agent.

§ 360. **Corporations.**—Officers of corporations occupy the relation of trustees and agents to both the corporation itself and to the individual stockholders, and they are held to discharge their duties with the fidelity and integrity required of other trustees or agents. Wherever a fraud is committed by them, the right of action to redress the same is in the corporation, if the wrong affects the corporate body as a whole, or in individual stockholders if the wrong is to individual interests. In equity the suit for a corporate wrong may be brought by individual stockholders for the benefit of all, if the wrong-doers are the governing officers themselves, or if the governing officers refuse to bring the suit.

Among the frauds that may be committed by corporate officers for which the stockholders may have redress are the following:

Where the governing officers persistently and knowingly exceed the corporate powers.

Where the officers refuse to furnish proper information or give false statements.

Where access to the books of the corporation is denied.

Where governing officers become purchasers from or sellers to the corporation, to its detriment.

Where the governing officers allow secret advantages to part of the stockholders or themselves, to the injury of other stockholders, or where they misuse or waste the assets.

§ 361. **Attorneys, physicians and clergymen.**—For the discharge of these professional duties it is necessary that there should be a high degree of confidence reposed by those who ask their aid. Without such confidence it would often be impossible to secure any benefit from the services required. The law not only favors, but protects to the fullest degree all communications made to secure such services. Not only does the law refuse to compel the professional man to disclose what was told him in confidence, but if the confidence is violated by his voluntary disclosure, a remedy in damages may be given for the injury done.

The confidence reposed begets a strong influence by the professional adviser. If in any business dealings between them any undue advantage is taken, the law will rectify the wrong by compelling the wrong-doer to make restitution or by giving damages against him.

§ 362. **Persons of weak mind.**—It is not intended here to refer to persons so idiotic and mentally diseased as to be incapable of contracting or giving consent. Such persons are not in any proper sense the victims of fraud. Fraud presupposes some intelli-

gence, enough at least to be misled. The acts of idiots are simply void.

There are, however, persons whose intellectual power, though feeble, is sufficient for carrying on some of the affairs of business. Their acts are not void. The law recognizes that such persons are not upon terms of equality with their fellows, and therefore justly requires of every person who deals with them a high degree of good faith. Acts that might not be held deceptive when practiced on a person of average intellect will be held fraudulent as to one of defective mental powers. The least undue advantage or unfairness taken by one in his dealings with the weakminded, will be laid hold of by the law as a ground for giving redress.

Persons intoxicated fall into the same category with those of feeble intellect. Whoever deals with a drunken person is held to take upon himself the burden of showing good faith. The greater the degree of intoxication, the greater is the necessity for exercising a scrupulous good faith.

And to the extent that their powers may be interfered with by defects, the blind and the deaf stand within the protection of the law.

It is to be noted that the case of persons of weak powers differs slightly from the ordinary one of trust in this: In the usual case of trust, the trustee is specially chosen, and extraordinary confidence is actually reposed in him; whereas, in case of persons of weak powers, it often happens that there was really no confidence placed whatever, but in fact the weaker one may have been suspicious, and resisting so far as was within his power. The duty of good

faith to the weak is not upon any special person, but upon any and every person who may chance to deal with them. The similarity of principles upon which relief is granted makes it proper to include this topic under the head of frauds in confidential relations.

Under confidential relations, an active duty is imposed upon the one trusted, and it follows that a fraud may be as easily, and in fact is most often, committed by negative rather than affirmative conduct. The law holds the trustee equally responsible if he fails to speak or act where he should do so, as where he engages in positive misleading practices. The person for whose benefit the trust exists need not usually exercise any care, but may without inquiry rely upon the trustee.

§ 363. **Fraud and deception between equals.**—As has been stated, the reason why so complete and careful redress is given for frauds done under confidential relations is, that in such relations the victim is off his guard and more or less in the power of the wrongdoer. Where no such confidential relation and hence no misuse of power exists, there is usually less need for the interposition of the courts. The parties being upon equal terms are able and are expected to use due care in protecting themselves. As a general rule, the law will refuse aid to one whose pretended loss by fraud is attributable to his own failure to exercise ordinary diligence and foresight. The question now is, what are the frauds which the law will redress, and what is the ordinary diligence required of every one?

§ 364. **Definition.**—Fraud or deceit is any trick, collusion, contrivance, false representation or under-

hand practice used for the injury of another. It need not be by words. Any positive conduct may be the equivalent of a verbal statement and be a deception. And in some cases silence or inaction may be sufficient to accomplish the fraudulent purpose.

§ 365. **Fraud by silence.**—In transactions between equals, the mere silence or inaction of one will not be regarded as a fraud, even though by speaking or acting he could have saved or prevented the other from error and loss. As for instance, if one knows there is a valuable bed of ore upon another's land, and without disclosing his knowledge buys the land, such silence is no fraud; for every one is supposed to be entitled to the gains he may make through superior knowledge, so long as he does not engage in underhand practices or tricks. If, however, the silence occurs in connection with any act or statement that gives it point and meaning it may amount to a fraud; as for example, if one stands by and allows his property to be sold as the property of another, or if one is referred to as knowing a statement to be true, and he remains silent in such a way as to create the impression of affirmance. So if one profess to state all of the facts and intentionally omits material parts, it is a fraud. By universal acceptance there are certain acts and statements that presuppose the existence of certain other facts, for instance, the giving of a check upon a bank, even though nothing be said, amounts to the statement that there are funds in the bank for paying it, and if there are not, there may be a gross fraud. While a seller of goods is not always bound to inquire for what purpose the goods are intended to be used, yet

if it is apparent or the seller is informed that the goods are to be used for a specific purpose, the act of selling them will be equivalent to a statement that they are fit for the use intended. In such cases it is the seller's duty to inform the buyer of defects not open to observation of the buyer, and silence may be a fraud. An example of this is the sale to a consumer of provisions apparently sound, but known by the dealer to be wholly unfit; the buyer is not negligent for omitting inquiry as to their fitness, and the seller's silence on the point amounts to a fraud.

§ 366. **Equal opportunities for knowledge.**—Where one party has equal opportunities with the other for knowing or ascertaining the truth, the general rule is that he must avail himself of his opportunities, or be left remediless, if through his want of diligence he is deceived. The decisions are not altogether harmonious, as to what will constitute equal opportunities, and what degree of diligence will be required. It is well settled, however, that if one party by any device disarms the other's suspicions, and induces him to refrain from making any examination he would otherwise have made, relief will be given for the fraud. If the subject as to which a representation is made is not at hand, or if it be of such a nature that an examination is not practicable, there will be no want of diligence in relying upon the representations made, but if they are false the transaction will be fraudulent.

§ 367. **Elements of fraud.**—In order to make out a cause of action for fraud or deceit, the following elements must concur :

1st. That the defendant made a false representation of a material fact.

2d. That the defendant had knowledge of its falsity.

3d. That the defendant intended it to be acted upon by plaintiff.

4th. That the plaintiff, believing it true, acted upon it to his damage.

These elements will be considered in detail.

§ 368. **Representations.**—A distinction must be borne in mind between a representation and a warranty. A warranty is part of the contract itself, to be enforced in the same way that the contract is enforced. A representation is not part of the contract, but is one of the reasons or inducements for making a contract. The breach of warranty is remedied by an action on the contract. A false representation is remedied as a tort. Although upon the same state of facts there may be a warranty, as well as representation, and the party injured may elect which remedy he will pursue, it does not follow that in all cases of breach of warranty there has been false representation. It is sometimes of great importance whether the cause of action is upon one or the other. Where the transaction in question is upon writings, the meaning intended by the parties must generally be gathered from the writings, and there will therefore be little difficulty. Where the matter is oral, however, the question is more doubtful, and must be left to a jury to decide, in the light of all the surrounding circumstances.

§ 369. **Clearness and certainty.**—In order to be a false representation, the words or conduct used must generally be clear and certain and not of vague and

indefinite import. They must carry a sufficiently definite meaning, so that a man of average intelligence would act on them. Indefinite and vague statements ought to put an ordinarily prudent person on his guard and upon inquiry; and if put on inquiry he can have no cause of action, for if he inquired he must have ascertained, and if he did not inquire his negligence defeats him.

§ 370. **Matter of law.**—A misrepresentation of a matter of law is usually not in law a fraud, for it is supposed that all men's opportunities for knowledge in this respect are equal.

If, however, it is clear that the opportunities are not equal, there may be a fraud. As for example, if the statement be made by an attorney with intent to deceive, or perhaps if made by any one professing familiarity with the law to one who is clearly ignorant. Persons are not supposed to have equal opportunity to know foreign laws, and a false statement in regard thereto may be a fraud.

§ 371. **Matter of opinion.**—As a rule, mere expressions of opinion, even though false, are not to be regarded as representations of fact, and will not amount to fraud. The question frequently arises upon statements as to value; they will usually be held to be mere expressions of opinion, for each party has an equal right and ought to form his own opinion. If, however, one has peculiar means of knowledge, as an expert, his false statement of value may be a fraud. And if property is at a distance and a purchaser is induced to refrain from making examination, but to rely on the seller's false statement as to value, it may be a fraud. The decisions are conflicting upon this

subject, but it is generally agreed that false statements of any facts that enter into the question of value will be a fraud, as for example, misrepresentation as to cost or what the price was on previous sale.

§ 372. **Matters of fact.**—In order to amount to a fraud the false representation must have been of a fact, *i. e.*, something existent or non-existent in the present or past. Representations as to matters in the future are not actionable for fraud; for such things can not be said to have existence. Statements as to the future can be no more than promises, or mere predictions. If they are construed as promises, they must be enforced as contracts, not remedied as frauds; and if they are predictions they are merely opinions, which the law will not recognize as instruments of fraud.

§ 373. **Fraudulent promises.**—Although the general rule is well established that a promise unfulfilled is not a fraud nor the evidence of fraud, yet it must be admitted that in actual business affairs a promise is often used as the principal means of committing a deception. In recognition of this, some of the courts, though not all, have attempted to escape the rigor of the rule. It has in some states been held that, if there is a present fraudulent intent not to keep the promise, there is a fraud; for example, if one should buy goods and promise to pay for them, having the secret intention not to pay for them, this would be a false statement as to a present fact, namely, the intent. The decisions are not uniform, however. Many courts hold that the law can not recognize as a fact the present intent as to a future act.

§ 374. **Materiality.**—It is essential that the misrepresentation shall have been material, *i. e.*, it must have influenced and been a controlling reason for the transaction. It need not, however, have been the sole or even the principal inducement. Its materiality is made to appear sufficiently, if in the judgment of a reasonable person the false statement was one of the reasons for acting.

§ 375. **Falsity.**—The representation must have been false, but it need not have been literally false. If such words were used as would carry to an average man the false meaning, they would be effective for the fraudulent purpose. Indeed a fraud might be accomplished by the use of words true in a literal sense, but false in the sense that would be commonly given them.

§ 376. **Wrong-doer's knowledge.** — If one innocently and upon reasonable grounds makes a statement, he can not be deemed guilty of a fraud even though the statement turn out to be false. He must have had some knowledge of the falsity. A statement will be regarded as false to defendant's knowledge, (1) if he had actual knowledge, (2) if he recklessly stated something as true when he had no grounds one way or the other, (3) if he stated something to be true of his own knowledge when he had only a belief. In each of these cases the defendant created in the mind of the plaintiff the impression that the defendant actually knew about the fact. There is another class in which the defendant may actually have had no bad motive and yet be deemed guilty of fraud, namely, where he was so specially situated that he was bound to know the

truth. Examples of the first three classes will easily suggest themselves. An example of the last class would be the case of one assuming to act as agent with certain powers; it is his duty to know his authority, and he is liable for any excesses even though he act under an honest belief that he had the authority.

§ 377. **Wrong-doer's intent that the representation be acted on.**—It is essential, to constitute a fraud in the legal sense, that the representation shall have been made with the intent that it should be relied and acted upon. This intent is to be gathered from the circumstances of the case. Where the representation is made between the parties themselves in a transaction, it is presumed that it was intended to be acted on, and no further proof is necessary in order to show such intention than that the defendant made the misstatement with knowledge of its falsity. But when the representation is made by a third person, such presumption does not arise, and there must be some proof that the person intended the misstatement to be relied on, or knew or had reason to know it was to be acted on.

§378. **Who entitled to rely on representations.**—It would be obviously impracticable to permit persons to rely upon any and every misstatement they may hear or read, and to hold the author responsible for ensuing damage. For, business operations and even social intercourse would involve such risk as to be unsafe. The law wisely restricts the right of action for fraud to the persons who were intended to be influenced by the misrepresentation. If one who was not intended to be influenced nevertheless acts

and is injured by a misrepresentation, he is remediless. There are cases, however, where the whole public are intended to be influenced, as where corporations publish false prospectuses. In such cases any individual of the public who relies thereon and is injured has a right of action against the authors of the misrepresentation.

§ 379. **Representation must have been acted on.**—It is self-evident that if the misrepresentation is not acted upon, any damage that results can not be attributed to it. If it appears that the party complaining did not at all rely on the misstatement, whether because he did not believe it, or because he preferred to examine for himself, there is no right of action. If, however, the misrepresentation formed any material part, even though slight, of the inducement for entering into the transaction, the whole is tainted with the fraud and remedy will be given.

§ 380. **Injured party's belief.**—It is essential, in order to make out a case of fraud to show that the injured person believed the misstatement to be true. Of course, if he knew it was false, there is an end to the action. And so, if by the exercise of ordinary diligence he could have known the truth, he can not complain that he was defrauded. If he did not know and was prevented from exercising ordinary diligence by any devices or tricks of the wrongdoer, his belief in the false statement would be justifiable.

As a general rule, a person is entitled to rely on a statement when it is made to him for the purpose of having him rely on it, and he is not chargeable with

negligence if he does not make examination for himself. But there are some obvious precautions that every one ought to take, as for instance, one ought to read an instrument before signing it, and failure to do so would be such negligence as would bar a recovery for fraud unless the person is for any reason unable to read or prevented by a clear trick from reading. And it is held that if the opportunity for verification is immediately at hand, it is one's duty to make examination rather than rely on a statement.

§ 381. **Damage.**—It is an essential of the cause of action for a fraud that there shall have been some damage done by acting on the misrepresentation. It is not sufficient that damage may occur in the future, it must have occurred.

§ 382. **The remedies.**—The law will redress a fraud, either by way of action, or by way of defense. The injured person may recover damages for his injury, he may recover back what he has been defrauded of, or he may have injunction against the wrong-doer's bringing an action, or against his disposing of the property fraudulently obtained. If an action has been brought by the wrong-doer upon the fraudulent transaction, the injured person may plead the fraud as a defense. In many cases of fraud, the law remedies the wrong by way of estoppel, that is to say, it compels the wrong-doer to abide by his false statement, and will not permit him to show it to be false.

§ 383. **Personal injuries through fraud.**—As has been shown under the head of assault and battery, it is usually a good defense to show that plaintiff consented to the act; but if the consent was obtained by

fraud, the defense is overcome. The fraud in such case is the essential thing giving a right of action. If one person knowingly hands another an explosive, and the latter, being ignorant, is without fault injured, the former is guilty of a gross fraud ; the action, however, would be for an assault and battery, or for negligence. And so, where one leaves exposed anything that is dangerous, whether on his own premises or elsewhere, in such a manner as to create an appearance of safety, and in consequence injury occurs to innocent persons, it is clear that the most important element of wrong is the deception ; yet the action would properly be considered as one for negligence or for nuisance. Where fraud produces personal injury, there is generally some other ground than fraud upon which the case may rest. It is conceivable, however, that there might be a case in which a malevolent person could by fraud alone cause direct personal injury, and which would be redressed upon the ground of fraud and deception. The usual field for fraud is that of property and contracts.

CHAPTER XXX.

NUISANCE.

§ 384. **How related to negligence.**—Nuisance may be described as some use of one's property or rights that is carried beyond the limits which a just regard to the welfare of others prescribes.

Negligence may be described as the failure to use ordinary care in the performance of some duty enjoined by law, whereby injury results.

Although the wrongs of nuisance and of negligence are in their nature essentially different and require a separate consideration, yet they have certain points of similarity and of difference which it will be instructive to bring into comparison.

They are alike in that they may affect either the person or property. They are further alike in that the wrong-doer does not primarily seek to destroy or take away the rights or property of the injured one, but the injury consists usually in only an impairment of the rights or property. The injury done is indirect, that is to say, the injury done is either not immediately at the hands of the wrong-doer, or not within his purposes, but generally occurs as the secondary effect of some wrongful act. It is not essential in either that there shall have been any evil motive; indeed, the legal wrong of nuisance, or of negligence,

may exist, although the actual intent was praiseworthy.

Among the points in which they differ, nuisance generally implies some duration of wrong-doing; negligence is usually from single acts or omissions. In nuisance the injury done may have been intentional or unintentional; in negligence it is essential that the precise injury shall have been unintended. In nuisance the question is as to the lawfulness of the act itself, in other words whether there is any right to do the act at all; in negligence the right to do the act is not generally in dispute, but the inquiry is as to the manner of doing it.

The line of demarkation between the principles that control the two classes of wrong is clear, yet the wrongs may co-exist under the same state of facts, and it frequently happens that one is involved as an essential element of the other. For example, a properly constructed railroad crossing in a street is not a nuisance, but if, through negligence in keeping it in repair, it becomes an obstruction, it will be a nuisance.

§ 385. **Nuisance defined.**—The word means "annoyance." A common definition is, "anything which worketh hurt, inconvenience or damage to another." Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life or property, is a nuisance. The definitions are unavoidably too comprehensive. Many wrongs that seem to be included within the bounds of the definition of nuisance are clearly within other classes that have been hereto-

fore considered. An assault and battery is injurious to health and offensive to the senses; a trespass interferes with the comfortable enjoyment of property; a libel worketh hurt, inconvenience and damage, but these are not nuisances. Only such wrongs falling within the definition as do not fall under other distinct heads are to be treated as nuisances.

A thing may be a nuisance (1) causing personal discomfort, as by interfering with one's quiet, or personal freedom, or affecting in an injurious way the senses, nerves or health; (2) causing material injury to property, as by loss of trade, deterioration of values, complete or partial destruction of property. In determining whether or not a given thing is a nuisance, there will be found to be some difference, when viewed as to its effect upon the person or upon property.

Whether an act causing mere personal discomfort is or is not a nuisance, generally depends upon the question whether, under the circumstances, it is reasonable; for, it is obvious that the carrying on of daily business operations necessarily involves some discomfort to neighbors. If one resides in a manufacturing district he must be content to endure more annoyance than would be permissible in a district used for residence purposes only. The discomforts are supposed to be outweighed by the advantage of having business conducted in such place. To be unlawful, the act must be one causing or threatening some sensible physical annoyance; if only mental disquietude is involved, there will be no nuisance. The annoyance can not, however, be allowed to exceed what is reasonable; whenever it does so it will

be a nuisance. Whether the annoyance does exceed what is reasonable is not to be determined by the standard of the people specially affected. It is not a question of the notions of any particular persons, whether they be over fastidious or over stupid. The standard to be taken is that of average persons of the community.

When the question is whether a thing is a nuisance by causing injury to property, the test to be generally applied is whether the injury is visible or sensible. If the injury is of the visible character, even though slight, the thing will be a nuisance, and it will be no defense to show that the business is being conducted in as reasonable a manner as possible. It is unlawful for one to use his property so as to injure his neighbors.

§ 386. "Coming to a nuisance."—As has been stated, the locality of a business very largely determines the question as to whether it is a nuisance or not. What would be a nuisance in a thickly populated place may be none at all in a place sparsely settled, as, in the outskirts of a town. There may, however, be a change in the surroundings. The town by gradual and natural increase may spread so that the locality of the business in question becomes thickly populated. The question arises, what is the effect upon the business? The argument would be that there has been no change in the business, and that the act of strangers in coming to the place ought not to make that a nuisance which was not a nuisance before. Formerly this argument prevailed in the courts, and it was held there was no right of action. Now, however, the law is settled the

other way. It is uniformly held that the author of a nuisance is not protected by the fact that he was on the ground first, and that the injured person "came to the nuisance." The reason for the rule as now established is that the owner of the vacant land is also entitled to protection, and if his vendees must take subject to the nuisance, the value of his land is impaired.

§ 387. **The intent or motive immaterial.**—Inasmuch as the test for nuisance is whether the thing done is lawful or unlawful, it is generally immaterial what was the motive. If the act be one that it is lawful to do, it can not be deemed a nuisance merely because it was done from bad motives. For example, every man has a right to keep surface water on his own land, and even though his doing so necessarily injures lower lying land that formerly depended on it for irrigation, there can be no action for the injury. The converse also holds good. If the act be one that does in fact create a nuisance, it is actionable even though done with the best motives, and even though it is highly beneficial or necessary to the public.

The motive is, however, considered to some degree where the act in question is one which merely affects personal comfort, so that a noise that is necessary to a proper business may be held to be no nuisance, when if the same noise were wantonly made for the express purpose of annoying it would be a nuisance. And while malice is not an essential of the cause of action for nuisance, it may always be involved upon the question of exemplary damages.

§ 388. **Care or negligence in nuisance.**—In nui-

sance, the question of care or negligence in doing the act is not necessarily involved. If the act be of such a character that it amounts to a nuisance, it is actionable even though the highest degree of care has been exercised. For instance, where a factory emits poisonous gas, it is no answer to show that the business can not be otherwise conducted and that the highest degree of care is used to prevent the escape of the gas. Where, however, the question is of a nuisance affecting only the physical comfort, it is sometimes of controlling importance whether due care has been exercised. Care is in such cases involved in the same way that intent or motive may be involved. For example, the smoke from a mill may be declared to be a nuisance where it appears that by the exercise of ordinary care it could be rendered almost inoffensive.

Where any state of affairs is lawful and inoffensive, and becomes offensive only by reason of its not being maintained in proper condition, the question of care or negligence is important. In such cases the unlawfulness of the nuisance would consist in the negligence of its origin, and if there was no negligence there would be no liability for nuisance. For it would be a highly inconvenient rule that would hold a man culpable where in spite of care and diligence his property suddenly becomes injurious.

§ 389. **What may be nuisances.** — Reasonable noises are not nuisances. In order to become unlawful, they must be unreasonable in their character, or be made at unreasonable hours. The ringing of church bells if in the day-time has been held to be not a nuisance, but if in the night-time has been held to be a

nuisance. The noises of a drinking-saloon were held to be a nuisance by day or night. The blowing of a trumpet at night or the barking of a dog at night have been held to be nuisances.

Smoke, dust, smells and noxious gases, causing sensible and physical discomfort, are nuisances. It is not necessary to show that health is being impaired thereby, the discomfort is sufficient to fix the character of the act as a nuisance. Fumes from burning old clothes, smoke from brick kilns, dead animals left unburied, cattle yards and pig-pens, cess-pools, vaults, livery stables, gas works, pools of stagnant water, excessive heat maintained to the discomfort of neighbors, collecting crowds in the streets by means of exhibitions, may be nuisances.

Things dangerous may be nuisances, even before any actual injury has occurred, as the pesthouse in a populous district, the keeping of explosives or inflammable things in such a way as to be dangerous, fires negligently kept, blasting rocks, setting spring guns and traps, whether on one's own land or not, provided they are so placed as to menace the safety of other persons.

Polluting the water of springs or streams, so as to render it unfit for use or offensive to the senses, is a nuisance. The same is true of underground streams and percolating water.

Interfering with the natural flow of water in regular channels, whether by unduly increasing or diminishing it, may be a nuisance. One may not dam up a stream so as to throw the water back upon his neighbor. As to surface water, not in regular channels, it is generally the law that one may keep it

all upon his own land if he wish, but whether he can cause overflows by building embankments on his own land to prevent the surface water coming from his neighbor's land, is a disputed question. In some states it is held to be a nuisance, in others to be lawful.

Obstructing travel upon highways, whether streets or waterways, is a nuisance.

§ 390. **Kinds of nuisance.**—Considered with reference to the persons affected by the unlawful act, a nuisance may be either:

1st. Public or common.

2d. Private.

3d. Both public and private.

Whether the nuisance be one or the other depends not on the character of the act, but upon the circumstances under which it is done and the effect produced.

§ 391. **Public nuisance.**—A public or common nuisance is punishable by the state and not by civil suit of individuals. It may be committed (1) upon the public premises, or (2) upon private premises in such manner as to interfere with the public. Its distinctive feature is that it affects the community in general, and that individuals affected do not sustain any peculiar or especial injury.

An example of nuisance which is public only would be an indecent exhibition in a public park.

§ 392. **Private nuisance.**—A private nuisance is one that affects certain individuals only, or certain individuals in a peculiar or especial way. A purely private nuisance must generally be committed or maintained upon private premises. It is redressed

by civil suit of the person injured, and not by indictment. An example of purely private nuisance would be the injury of a neighbor's shade trees by noxious gases from a factory.

§ 393. **Nuisances both public and private.**—The unlawful act may be at one and the same time a public and a private nuisance, according as it is complained of by the state or by the individuals injured. The state may punish by indictment, and the individual injured may also recover in a civil suit. Neither remedy is exclusive of the other. As an example of nuisance having this double character, may be given the pollution of a public drinking place ; the public would be prevented from enjoying the water, and there would be a public nuisance ; if any individual should inadvertently drink of the polluted water and be thereby made sick, he would have a right of action as for a private nuisance.

§ 394. **Authorized nuisances.**—The right to maintain a strictly private nuisance may be acquired by twenty years uninterrupted continuance of the nuisance. No shorter time will be sufficient to give any rights. But, when the full time has elapsed, the right to maintain the nuisance is complete, and it can not then be lost by any discontinuance short of twenty years. If the nuisance be public, no right to maintain it can be acquired by lapse of time, and this is true, even though it be also a private nuisance.

What would otherwise be nuisances may sometimes be authorized and made lawful by the act of the state. As to nuisances strictly public, no one has the right to complain except the state, and the legis-

lature may surrender this right by declaring the act in question to be lawful or by commanding such act to be done. Any act done under authority of an act of the legislature can not be a public nuisance. In case of private nuisances the power of the legislature does not extend so far. The legislature can not make lawful any act the effect of which would be to take away or impair the rights of property without compensation therefor. Subject to this limitation, it may, however, declare what shall or shall not be private nuisances, and the enactments will be valid.

§ 395. **Obstruction of highways.** — Nuisance by obstructing and interfering with highways may be either public or private in effect, or may be both. Whether it is punishable criminally as a public nuisance is generally a matter of statutory enactment. In so far as the question of private nuisance by obstruction of highways is concerned, the well settled rule is, that whoever, without special authority, materially obstructs a highway or renders its use hazardous is liable to one who sustains a special injury thereby. The rule raises the following questions, to be considered in order:

1. What is a highway?
2. What is obstructing or rendering hazardous?
3. What is without special authority?
4. What is special injury?

§ 396. **What is a highway?**—It is the general name for all kinds of public ways, whether carriage ways, bridle ways, foot ways, navigable streams. It also includes bridges, turnpikes, railroads, canals and ferries, but the public rights in these cases are

complicated with the rights of the persons or corporations controlling the ways, so that many other principles are involved in their obstruction.

The public highways belong to the public for use from side to side and from end to end. They are entitled not only to free passage along the highway, but over any portion of it not in actual use of some other traveler.

§ 397. **Purprestures.**—As already intimated, anything that prevents or interferes with the free passage by travelers is an obstruction. If the obstruction consist in enclosing a part or all of the public premises and excluding travelers, it is called a purpresture. A purpresture is something more than a mere nuisance in that it involves not merely an annoyance to the public, but also a taking of public property. Hence although to constitute a mere nuisance it is necessary to show that some one or more have suffered actual injury or annoyance, the wrong of purpresture may be complete without putting the public or any person to any inconvenience whatever. All the other elements of a nuisance must be shown. Following may be given as examples of purpresture: Fencing in a part of the highway, building a house in the street, constructing a stairway to overhang an alley.

§ 398. **What is an obstruction?**—An obstruction need not involve taking possession of the highway. It is anything beyond a reasonable use of the highway for purpose of passage, that interferes with travel. A railroad track in the street, posts or railings along sidewalks may be nuisances.

It is not essential that there shall be a physical obstruction of the surface of the highway. Any-

thing above or below or on the surface that interferes with the free use of the surface may be a nuisance. Cornices overhanging a sidewalk and bay-windows projecting high above the sidewalk have been held to be obstructions.

§ 399. **Duration of the obstruction.**—The obstruction need not be permanent in character in order to constitute a nuisance. It is sufficient if the highway be used for an improper purpose or for an unreasonable time. Placing logs in the street over night, blocking the way by loading and unloading goods, if unreasonably prolonged ; a temporary ditch dug, or a rope temporarily stretched across a street, using the highway for pasturing cattle, may be nuisances.

§ 400. **Objects near the highway.**—The obstruction need not be within the bounds of the highway. If the object be so near as to interfere with and endanger travel, it is an obstruction. The ruinous wall of a burned building, standing on private premises, but menacing travelers on the highway, is a nuisance, and the same is true of objects near a highway calculated to frighten horses.

§ 401. **Authorized obstructions.**—As has been shown, the state by its legislature may legitimate what would otherwise be a nuisance. And so the state may for the public benefit legitimate obstructions in highways. But even when so authorized by the state, if the obstruction amounts to a taking of private property, or imposing additional servitudes thereon, the property-owner is entitled to full compensation therefor. If the authority is strictly followed, the obstruction will not be a nuisance. For instance, an unauthorized railroad track would be

a nuisance in a street. If the track were built properly and under authority of the statute, it would be no nuisance, but the adjacent owners could recover for the added servitude. If, instead of being built properly, the railroad track should contrary to authority be constructed many feet higher than the grade of the street, it would be a nuisance. If an individual who has the right to complain of an obstruction sanctions it, he can not afterwards object to it. As, if a property-owner consents to a railroad in a street, he can not afterwards have it abated as a nuisance, and sometimes he is precluded from recovering damages therefor.

If an authorized obstruction is suffered to become ruinous or out of repair, it may be called a nuisance, but the wrong is primarily one of negligence.

§ 402. **The special injury.**—In order to give a private right of action on account of an obstruction, there must be an injury that is special to the individual injured. If the injury is the same as is suffered by every one of the public, there can be no private right of action. In order to be special in the present sense, it is not enough that the injury be greater in degree than that suffered by the public, but it must be different in kind. So, for mere delay in a journey, or being compelled to take a more circuitous route on account of an obstruction, the weight of authority is that no action can be maintained. For any member of the public would suffer the same inconvenience. But if through the delay the traveler sustains a peculiar loss, as the loss of a market, deterioration of perishable goods and the like, he may recover. If one's access to his property

is cut off, it is a special injury. And so are injuries to person or property received from collision with the obstruction.

§ 403. **Remedies for nuisance.**—Public or common nuisances are redressed by a criminal action, and it is often provided that judgment may be given to abate the nuisance. The remedies for private nuisance are three:

1st. Abatement by the act of the person injured. If he avails himself of this summary remedy he takes the risk of its being a nuisance, and will be liable for his mistake if it is not, and he is bound to act moderately and can not commit a breach of the peace. A private person is not justified in abating a public nuisance, unless it is also a private nuisance as to him.

2d. Damages. The person injured may recover his actual damages from the wrong-doer, and if the nuisance be malicious or wanton he may also recover exemplary damages. The remedy by action for damages is not barred by the person having abated the nuisance by his own act. Both remedies may be pursued.

3d. Injunction. It often happens that a judgment in damages will be an inadequate remedy, and in such cases a court of equity will grant an injunction against the maintenance of the nuisance. This remedy will be given, however, only where the injury is of a serious and permanent character, and will usually be withheld where the nuisance is a business lawfully conducted, and the complainant will be left to his action for damages.

§ 404. **Evidence of nuisance.**—Ordinarily the burden is upon the plaintiff to show the existence of the nuisance and also what the injurious effect is. Some things, however, are so uniformly and under all circumstances offensive that the courts take notice without evidence that they are nuisances. These are called nuisances *per se*. Formerly, many things were regarded as nuisances *per se*, as things prejudicial to public morals, disreputable houses, saloons, things dangerous to life, powder magazines, nitroglycerine works, and all material obstructions in highways. The tendency of the courts now is to restrict rather than extend the limits of the phrase nuisance *per se*. And in many states some things that were formerly nuisances *per se* are not now so considered. But wherever the restriction has taken place, such nuisances are now regarded as *prima facie* nuisances, *i. e.*, instead of requiring the plaintiff to show that they are injurious, the courts presume them to be and require the defendant to bear the burden of showing that they are not injurious.

CHAPTER XXXI.

NEGLIGENCE.

§ 405. **Actionable negligence.**—The word negligence as commonly used covers all cases of omission to do that which ought to be done, but in the legal sense the meaning must be narrowed. The law does not give a remedy for every case of omission. It is only as to such as the law redresses by way of action or defense that the term negligence should be applied.

§ 406. **Contract or tort.**—Negligence may exist, 1st, as a pure tort, *i. e.*, a wrong not arising out of contract; 2d, as a tort connected with a contract, but which may be treated as a wrong independent of contract; and 3d, as a mere unintended breach of a contract involving no tort. Cases of the latter class, so far as legal redress is concerned, will amount to the same as any other breach of contract, and will therefore be considered in the chapter on contracts. In the second class the person injured usually has the right to choose whether he will treat the wrong as a mere breach of contract or as a tort, and if he chooses the former, the principles of contract control, if the latter the principles of negligence. Under the head of negligence, therefore, will be here considered only wrongs of the first class, and

such wrongs in the second class as are treated as torts.

§ 407. **Elements of actionable negligence.**—In order to constitute negligence there must be :

1. A legal duty to use care.
2. A breach of that duty.
3. Absence of distinct intention to produce the precise damage.

To make it actionable there must be also :

4. Damage to the plaintiff.
5. The damage must be the proximate result.

§ 408. **Definition.**—Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care under the circumstances in observing or performing a non-contractual duty implied by law, which failure is the proximate cause of injury to a person to whom the duty is due. The elements of the definition must be considered in detail.

§ 409. **The inadvertence.**—A conscious failure to use ordinary care is a willful act, from which the law presumes an intent to injure. The willful doing of a wrongful act implies malice. When such a wrong occurs, the guilty person is liable for all the damages that result, even for what would be deemed too remote if the act had not been willful. Such a wrong is not one of negligence. The phrase, "willful negligence," though it has been much used, is by the best authorities regarded to be a contradiction in terms. It is true, however, that many wrongs are very close upon the line dividing willfulness and negligence, and whenever there has been willfulness the plaintiff has the option to treat it as negligence. He may understate his case and it

would not be for the defendant to escape by showing his act to have been malicious. The uniform rule is that in an action for negligence there can be no malicious intent, or willfulness involved.

§ 410. **Inevitable accident.** — Inadvertence does not, however, mean that the injury could not have been foreseen. It is not equivalent to inevitable accident. The latter occurs when the cause of the injury is so unusual that human foresight could not have foreseen nor guarded against it. To be guilty of negligence, the person must have been in some way in fault, otherwise the accident is as to him inevitable. For instance, unknowingly carrying an explosive and handling it on the theory that it is innocent would not be negligence in the carrier. But if inevitable accident combine with any negligence in the person charged he will be liable.

§ 411. **Ordinary care under the circumstances.**— There can be no negligence unless there has been an absence of that degree of care which a person of ordinary prudence is presumed to use under the particular circumstances to avoid injury. Such care must be in proportion to the danger to be avoided and the consequences involved in its neglect. What is and what is not the requisite care must be determined from all the facts in each case, and from the nature of the duty owing. The same facts may at the same time amount to ordinary care as to one person and not as to another. For instance, if a land-owner has an unguarded pit on his land, and two persons fall into it, one of whom is a trespasser and the other an invited guest, as to the former there would be no negligence, while as to the latter there would be.

§ 412. **No degrees in negligence.** — The test is always whether ordinary care under the circumstances has been exercised. The classification into gross, ordinary and slight negligence or care is confusing, and is of no substantial benefit to the inquiry in any special case. It is practically impossible to draw a line between the classes and the classification, though formerly made by the courts, is now almost universally abandoned. It is true the duty owing may be greater in one case than another, and the same act may be sufficient to discharge the duty in one case which would be insufficient in another. Hence, the inquiry must always first be as to what is the duty owing. That settled, the only question is, was ordinary care exercised in the performance of that duty ?

§ 413. **Acts or omissions.**—Negligence may consist in either an act or an omission to act. In other words, ordinary care under the circumstances may require one to do an act, or to refrain from doing an act. The question is, what is the duty, positive or negative, and whichever it is, has the duty been violated ? In a wider sense every negligence is an omission, *i. e.*, a failure to discharge a duty owing.

414. **Legally responsible person.**—If a person is wholly incapable of exercising care in its legal sense, he can not be held guilty of negligence, and upon principle ought never to be held liable in damages for his act. There is an apparent exception in case of infants and lunatics, who, according to the statement of some writers, are liable for all their torts, including negligence. In most of the decided cases the infant or insane had capacity for some degree of

care, and should have been held liable for failing to exercise such prudence as was possessed. In the remaining cases, where the infant or insane was wholly incapacitated, the recovery of damages can be sustained, not on the ground of negligence in the afflicted one, but in his parents or guardians. The true rule is believed to be that a person incapable of exercising care is not liable for a failure to do so, but if there is any capacity at all, he must exercise such care as he is capable of.

Consistent with the rule are the cases of unconscious agents, *e. g.*, persons who without fault do not and can not know the danger, and act with only such care as their knowledge dictates. Persons under duress are not free to exercise any care, hence not guilty of negligence, but this must be confined to cases where free will is wholly taken away. Persons acting under sudden alarm from any cause that robs them of possession of their senses are not legally responsible.

§ 415. **Intoxication.**—Voluntary intoxication does not relieve one from exercising all the care he should have exercised if sober. His negligence begins with his becoming intoxicated, and he is responsible for the consequences. Instead of being an excuse, intoxication has been held to be evidence tending to prove negligence.

§ 416. **Physical infirmity.**—Adults of sound mind are, so far as negligence is concerned, presumed to be equally capable of exercising ordinary care. A man of dull mind is charged with the same kind and degree of care as is a man of brilliant intellect. Physical infirmities, however, must be taken into consider-

ation. No one is bound for a failure to exercise a sense that he has not. But he is bound to make up for his defect as best he can by his other senses. While it can not be stated as a rule that less care is required of a woman than of a man, it very often happens, especially in cases involving physical or nervous power, that sex is of importance, in determining what is ordinary care under the circumstances.

§ 417. **The person to whom the duty is owing.**—In order to constitute actionable negligence there must have been a duty owing to the party complaining. The fact that there has been a violation of a duty owing to one person does not give another person a right of action therefor, even though the latter receive injury. For instance, a land-owner owes the duty to his invited guests to guard them against the danger of a pit on his land, but he owes no such duty to a trespasser, and will not be liable if the latter falls into the pit.

§ 418. **The duty.**—Of course, if the act in question does not violate any duty, there can be no action. For example, a traveler on a highway, for his own convenience makes a temporary bridge over a ditch; he owes no duty to any one to build the bridge in any particular way, or to build it at all. Hence he is not liable to another traveler who afterwards tries to cross and is injured.

§ 419. **The duty implied by law.**—In order to be actionable as negligence, the duty that is violated must be one implied by law, independent of contract. Though there may be a contract involved, yet the wrong done must be so far separable from

the contract as to give an independent right of action. For example, a man makes a contract with a railroad company to carry him and his servant. There is no contract with the servant. But there is the duty implied by law from the relation of passenger and carrier. For any injury the servant may recover, because this duty implied by law has been violated. And the master, if injured, may recover damages on the same ground. Though there was a contract with the master, there was also the duty implied by law from the relation of passenger and carrier. Hence the master could recover for the negligence as a tort, or he could recover for the breach of contract.

§ 420. **The damage.**—Unless some substantial injury was done there can be no action for negligence. Damage is an essential element; and it is obvious that the damage must have been to the plaintiff specially. If from any careless act the plaintiff is injured only in the same kind and degree as the whole public there will be no cause of action.

§ 421. **Cause and effect.**—The connection of cause and effect between the breach of duty and the injury must be established, otherwise the negligence is not actionable. It must be shown that but for the breach of duty the injury would not have happened. But while this is necessary to be shown, it is not enough. The plaintiff must go further and show that the breach of duty was an efficient cause. For example, if a passenger carrier is guilty of delay so that he arrives at a place on the road where a sudden storm injures the passenger, it might be evident that the injury would not have happened but for the negli-

gent delay; and yet it is also clear that such an injury might equally well happen where the carrier is unusually diligent. The storm and not the carrier's delay is the efficient cause of the injury. It is a uniform rule, however, that if the defendant's act was an efficient cause, he is not relieved by the concurrence of other causes, whether they be called the negligence of others, inevitable accident, or the act of God.

§ 422. **The legal connection.**—Difficulty lies not only in tracing a causal connection, but also in determining whether the connection is sufficiently close to be cognizable by the law. Theoretically there is no end to the effect of an act, and no cause back of which another cause may not be found. The law, however, is practical and draws lines beyond which the search for cause or effect shall not be prosecuted. It requires that the act shall be shown to be the proximate, not the remote cause of the injury.

§ 423. **Definition of proximate cause.**—Proximate cause is that which in a natural and continuous sequence, unbroken by any new cause, produces the event and without which the event would not have occurred.

A remote cause is one which has so far expended itself that its influence in producing the injury is too minute for the law's notice; or a cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof.

§ 424. **Plaintiff's own conduct.**—In the search for the causes of an injury, it usually happens that some conduct of the person injured must be considered as

an agency. The question arises, how far does this affect the liability of others?

It is obvious there is but one way in which plaintiff's conduct can have any effect in relieving other causes of injury, and that is by being itself a cause. In determining whether it is or is not a cause, the plaintiff's conduct is to be considered and weighed as a fact, in the same way with all the other facts in the case. And the same rules governing causal connection apply. If no relation of cause and effect can be shown between plaintiff's conduct and the injury, the right of action against others is unaffected, it matters not what may be plaintiff's fault or innocence in such conduct.

If, on the other hand, plaintiff's conduct, whether wrongful or not, is shown to be an efficient and superseding cause, it will be deemed the sole cause. Between these two are the cases in which plaintiff's conduct is an efficient, but not a superseding cause, and these embrace the subject of plaintiff's contributory fault. It should be noted at the outset that no question can arise as to plaintiff's fault, except upon the assumption that there has been fault in the defendant; for if the defendant is innocent, the case is at an end.

It is a general rule, founded on the maxim, "no man shall take advantage of his own wrong," that if one is injured by the negligence of another, he can not recover damages unless he is himself free from fault proximately contributing to the injury. This fault in plaintiff may consist (1st) in an act unlawful in itself, (2d) in negligence only.

§ 425. **Plaintiff's unlawful act.**—If an unlawful

act of the plaintiff be an efficient proximate cause of the injury to him, he can not recover against another person whose negligent act was also an efficient cause. For example, if two thieves break into a house with drawn pistols, and one by negligence shoot the other, no action could be maintained. It is essential, however, that the plaintiff's unlawful act be proximate in causation; for if the unlawful act amount only to a condition or remote cause, it will not bar his action. For instance, though traveling on Sunday be made unlawful by statute, it would not bar an action against one who should negligently frighten plaintiff's horse on Sunday. For it is not a natural sequence of Sunday travel that such injury should happen.

§ 426. **Contributory negligence.** — The common law rule was that there could be no recovery for negligence of another if the injured person by his negligence proximately contributed to the injury. This rule has been adopted as the law in the federal courts and in the courts of nearly all of the states. Modifications exist in Illinois, Georgia, Kansas and Tennessee, under which there may be a recovery if the defendant was grossly negligent and the plaintiff negligent only to a slight degree. Wherever the common law rule prevails any negligence of the plaintiff that proximately contributes as a cause of the injury will defeat a recovery. In some states plaintiff's negligence is for the defense to prove, in others the plaintiff must show its absence.

§ 427. **Tests of contributory negligence.**—In ascertaining whether negligence exists, the plaintiff's conduct must be viewed in the light of all other

facts in the case, and in general is subject to the same tests as is the defendant's conduct. There must have been a failure by plaintiff to use ordinary care, or the accident is, so far as his responsibility goes, inevitable. There must have been a want of such ordinary care as was required under the particular circumstances. The classification into slight, ordinary and gross is generally abandoned here, as it is where defendant's negligence is the question. The kind and degree of care depends on the facts in each case. The plaintiff's negligence may have been an act or omission. Subject to the exceptions made under the doctrine of imputable negligence, which will be hereafter considered, the plaintiff must have been legally responsible for his conduct. Voluntary intoxication does not relieve the plaintiff from exercising all the care he should have exercised if sober. Physical infirmities are taken into account, and while plaintiff is not expected to use powers that he does not possess, he is bound so far as possible to make up for defective powers by the use of those he has, and it is essential that the plaintiff's conduct be a proximate cause of the injury.

§ 428. **Plaintiff's knowledge of danger.**—The fact that plaintiff knew there was danger is not conclusive that he was guilty of contributory negligence. A man may be fully conscious of danger, and yet be in the exercise of ordinary care under the circumstances. Some risks must always be taken; the question is, what risks will a prudent man take?

§ 429. **Danger incurred to save life or in discharge of duty.**—One who is saving the life of another in peril from the defendant's negligence is not

guilty of contributory negligence, unless the attempt to save is so rash as to be practically certain to result in injury, or, as is sometimes held, unless the person to be saved was himself in the wrong. A son who tried to save the life of his father, who was negligently on a railroad track, was not allowed to recover against the railroad company for its negligence.

One charged with the duty of caring for others is not guilty of contributory negligence even though he discharge that duty in the face of certain danger, provided, of course, that he could not have done his duty in any safer way. But a person so injured must himself have been free from any fault in creating the danger. So, an engineer who stays at his post to save passengers from a collision is not to be deemed guilty of contributory negligence, unless, for instance, he violated orders in starting and thereby brought on the collision.

§ 430. **Persons of defective powers.**—As has been shown, persons of defective powers are not guilty of negligence for failing to exercise more care than they are capable of exercising. This is equally true where the question is upon contributory negligence of such persons. It naturally follows that a correspondingly higher degree of care is required from all who deal with such persons. An act that would be ordinarily careful, if done toward a grown person, might be negligent if done toward a child. It is always presupposed, however, that the defective condition of the person was or ought to have been known. So that, an engineer would not be negligent for expecting a man to step off the track when he sounded the

whistle, without checking speed, whereas, if he had notice that the man was deaf, it would be negligence.

§ 431. **Misleading conduct.**—A plaintiff is not chargeable with contributory negligence, whose erroneous act was caused or induced by the misleading conduct of the defendant. If he has a right to rely and does rely upon defendant's verbal directions or conduct, assuring him of safety, he is blameless, provided the danger is not obvious; and where by the defendant's negligence a sudden danger confronts the plaintiff, he is not in fault if in the haste and alarm he does not choose the safest course, or even if he chooses the only dangerous course.

§ 432. **Imputable negligence.**—The principle on which the doctrine of imputable negligence rests is that the innocent person and the guilty person are identified as in a joint enterprise, by agency or by having the right to control. The case of saver and saved has been alluded to; the negligence of the one saved being imputed to the saver. The negligence of a servant is imputed to the master, for he has the right to control. Partners, whose goods are injured by negligence of another, can not recover if the negligence of one partner contributed, for his negligence is imputable to all. The cases of carrier and passenger, and of children, require a few words more.

§ 433. **Passenger and carrier—Imputed negligence.**—The old English rule, established by the case of Thorogood *v.* Bryan, was that in an action by a passenger against a third person for a negligent injury, the contributory negligence of the carrier will be imputed to the passenger. It was assumed

that a carrier is a passenger's servant in all cases. The rule has been overthrown in England, and is not in force in the United States courts, nor in most of the states.

§ 434. **Children—Imputed negligence.**—The question is only concerning children too young to be capable of exercising any care whatever; for if they have any capacity at all they will be negligent for failing to exercise it, and at the same time will be responsible only for their own negligence. Whether the negligence of parents or custodians shall be imputed to children who are themselves incapable of exercising care and hence incapable of negligence, is a question upon which the authorities are divided. The better reason is against imputing negligence in such case.

§ 435. **Presumptions as to negligence.**—As a rule negligence is not presumed, but must be proven. The mere fact that some one has been injured does not usually make it probable that any particular person has been negligent. But the circumstances under which an injury occurred may be such as to create a presumption of negligence, and throw the burden upon a certain person to prove himself without fault. If, judged by common human experience, a fact could not exist except by some negligence, the court will, in the absence of other evidence, declare that there was negligence. For instance, if a passenger is thrown down by the jerk of a street car, the presumption is that the jerk was by negligence of the street car company; if a boiler on a vessel explodes, it is presumed to have exploded by negligence of those in control. The presumption can

always be overcome by the defendant showing that in fact he exercised ordinary care under the circumstances.

Whether the presumption shall be made depends somewhat upon the nature of the duty owing and the degree of care required in its discharge. Where there is an obligation for especial care, the presumption of negligence will be made, when it would not under ordinary circumstances. For example, if a railroad train runs off the track and injures a passenger and a bystander, as to the passenger the presumption of negligence in the railroad company would arise, but not as to the bystander.

CHAPTER XXXII.

ANIMALS.

§ 436. **Injuries by animals.**—The subject of injury by animals is in some respects peculiar, partaking as it does of the nature both of nuisance and negligence. In this place, injuries caused by the voluntary act or purpose of the owner of the animals, will not be considered, for such injuries would usually be deemed an assault and battery by the owner himself.

In considering the law, a distinction must be kept in mind from the outset, between acts that are a trespass on land and acts that are not.

§ 437. **Trespass upon land by animals.**—Every unwarrantable entry by one's animals upon the land of another is a trespass, whether the land be enclosed or not. If any part of the animal cross the line the trespass is complete.

§ 438. **Duty of owner at common law.**—At common law every owner of animals was bound at his peril to keep his animals from straying upon another's land. The duty was absolute, and was not discharged by the exercise of the highest degree of care. Hence, no question of negligence was involved. The absolute obligation attached, however, only as to such animals as, from their nature, were capable of damaging land or crops. And an excep-

tion was made in favor of the owners driving cattle along a highway, and in such cases the liability was not absolute, but the owner was relieved if he exercised ordinary care to prevent the trespass.

§ 439. **The law in the United States.**—The common law rule of absolute liability for injuries done by trespassing animals is generally in force in the United States. In some the wrong is not treated as negligence; in others it is called negligence, but the negligence is conclusively presumed from the fact of trespass. Statutes in the various states have modified the English rule to some extent by requiring land-owners to maintain sufficient fences.

§ 440. **Remedies.**—In addition to the usual remedy by an action for damages, the land-owner was entitled to take possession of the trespassing animal and keep it until the damage was paid. Or he could drive the animal from his premises to the highway, using no more force than needful. For any excess he would in turn become liable himself.

§ 441. **Animals not trespassing.**—It was formerly held at common law that the owner of a wild beast, or a domestic animal known to be dangerous, was bound at his peril to keep it confined, and that it would be no defense that the owner exercised care to prevent injury. The dangerous animal was deemed a nuisance and the keeping it was an unlawful act.

The present rule is that for injuries done by an animal, other than by trespass, the owner is not absolutely liable, but liable only for a failure to use ordinary care. Whether the animal be dangerous or tame, the owner is liable only for negligence. The care required must, of course, be proportioned

to the danger to be apprehended. In order to charge an owner or keeper for injuries by animals, it is necessary to show that he had knowledge of the dangerous propensity and failed to take proper precautions.

§ 442. **Owner's knowledge of danger.**—Distinction is made, so far as the evidence of negligence in the owner is concerned, between (1) animals naturally vicious and (2) tame animals that have become vicious.

As to naturally wild and vicious animals, the presumption is conclusive that the owner knew them to be dangerous.

As to animals that have broken through the tameness of their nature and become vicious, there is no presumption that the owner knew of the dangerous propensity, but proof of a single breach brought home to the owner's notice is sufficient. Thenceforward they are to be treated the same as naturally wild animals.

As to tame domestic animals, the owner is bound only for a negligent failure to keep them confined, and then only for such injuries as from their nature they are likely to commit.

CHAPTER XXXIII.

HUSBAND AND WIFE.

§ 443. **Right to marry.**—A refusal to perform a promise of marriage is only a breach of contract, the remedy for which is in general the same as for breach of any other contract. It sometimes happens that a fraud becomes mingled in the making or breaking of the promise, and in such case the whole becomes a tort. For example, if a man of negro blood, pretending to be white, should induce a white woman to enter into an engagement for marriage with him, such marriage being illegal, there would be a wrong whether the marriage ceremony were performed or not. The same would be true if one of the parties were already married.

If third persons wrongfully interfere with mutual promises of marriage and break the engagement an action lies in favor of the one injured. But, generally, such a wrong will be one that is actionable upon some other ground.

§ 444. **Marriage.**—Under this head there are to be considered, first, the formation of the relation; second, the rights, duties and liabilities that arise out of marriage, and third, its dissolution.

Marriage is defined to be the lawful union of one man with one woman, to the exclusion of all others, by a bond that can not be dissolved by the act of either

or both, and can only be dissolved by the authority of the state. If the union be made as a temporary arrangement, to be ended at the pleasure of either party, it is not a marriage.

§ 445. **Illegal marriage.**—In order to be a valid marriage, the union must be lawful. Some persons are by law incompetent to marry and marriage between certain classes is prohibited. The subject is controlled by statute of the various states, and the legislation has not been harmonious. Some of the principal grounds upon which marriages are prohibited will be stated.

The marriage of near relations is forbidden, the degrees varying in the several states. Marriage between a black and a white person is in many states void, in some others is punishable criminally. If either party is physically incapable of marriage, it is null and void. If either party have a wife or husband living, the second marriage is void. A marriage procured by force or fraud is voidable at the option of the party wronged.

§ 446. **Marriage ceremony.**—The law contemplates that the marriage ceremony shall be attended with some degree of publicity. Usually, only a judicial officer or minister of the gospel is by law allowed to solemnize marriage. A license by the state must usually be obtained. Violation of such provisions does not generally invalidate the marriage. Any marriage may be valid, if the parties in the presence of witnesses declare that they then and there take each other as husband and wife.

§ 447. **Foreign marriages.**—It is a well settled principle that a marriage valid where it is cele-

brated will be deemed valid everywhere, and one invalid where celebrated will be deemed invalid everywhere. This, however, is subject to the exception that if the marriage be deemed immoral or incestuous in the domicile of the parties, and they go into another country merely to evade the law of their own, the marriage will be void.

§ 448. **Duties and rights of husband and wife.**— The duty of the husband is to love and protect the wife, and to provide for her according to his means and condition. The duty of the wife is to love, honor and obey the husband. The husband has the right to select the domicile, and it is the wife's duty to follow him. The husband has not now any right to chastise or restrain the wife, whatever may be her fault, and neither can be compelled to live with the other. It is the duty of the husband to provide for the offspring of the marriage, according to his station. By reason of the fiction of legal unity of husband and wife, and also upon grounds of public policy, husband and wife can not be compelled to, and will not be permitted to, testify as to communications made between them. And formerly they were not allowed to be witnesses for or against each other.

At common law a husband was liable for his wife's antenuptial debts, and the wife could make no contract that bound her. In most of the states legislation has greatly enlarged the powers and liabilities of married women, so that now ability seems to be the rule and disability the exception. A wife may be the agent of her husband, or the husband may be agent for the wife. A wife may always bind her husband for necessaries furnished her, and what

these are depends largely upon the condition of the parties. Formerly, a husband was liable for all wrongs done by his wife; now, however, keeping pace with the enlargement of her rights and powers, a married woman is liable for her own wrongs, and the husband is not liable except for such as he was party to. The law now is in nearly all states that a married woman may own property the same as if unmarried, and but few limitations are placed upon her power to dispose of her property.

§ 449. **Divorce.**—Many of the duties owing from a husband or wife to the other are of imperfect legal obligation, in that performance of them can not be enforced, but for some of the grosser violations of the marriage contract, the law gives a remedy by divorcing the parties. What shall be cause for divorce is the subject of diverse statutes in the various states. Generally the causes are adultery, abandonment, failure to provide, or cruelty. The suit to put an end to the marriage contract differs from the ordinary suit upon contract, in that the plaintiff's domicile, and not the defendant's, fixes the place for beginning suit. The reason for this is that there is more than a contract involved, namely, the legal status of the party complaining. On account of the interest the state has in the marriage, the parties have no legal right to agree upon a decree of divorce, but the court may, and usually does, hear some evidence.

If cause for divorce exists, the court usually allows alimony to the wife, if she is the innocent one. It is usual in estimating alimony to base it upon the value of the wife's interest in her husband's property.

§ 450. **Injuries between husband and wife.**—At common law the legal existence of the wife merged in her husband. No suit in her name could be maintained unless he joined. There was scant redress by civil suit for any injury done by one to the other, and but few injuries were punished criminally. As has been said, the tendency of legislation has been to detroy the legal fiction that husband and wife are one person, and to treat them as separate individuals, especially in their property rights. In some states statutes have placed the wife on such a footing that she can sue her husband for any civil wrong, the same as if unmarried. In others the courts have been conservative, and have restrained what was apparently the liberal intention of the legislature, and the wife is not allowed to sue her husband for many civil wrongs.

§ 451. **Injuries by third person.**—The right to recover for injuries done by a third person to husband or wife depended originally on the right each had to services of the other, and the damage consisted in the loss of such services.

From the fact that at common law a wife was the inferior person, it followed that she suffered no legal damage by the loss of her husband's society and services, and hence she was not permitted to recover damages for any personal injuries to him, nor for his being enticed away whereby she was deprived of support.

With the statutory enlargements of the wife's rights the courts have gradually enlarged her rights as to her husband's society, until now it is generally

held that the right to society and not the right to services is the true basis of recovery, and that a woman as well as a man may maintain an action for deprivation of the right.

At common law a husband had a legal right in the services of his wife, and could recover damages for any injury to his right. The basis of recovery for the husband has been gradually changed, as in the wife's case, and now rests principally upon the right to the wife's society. So that now a husband may recover against one who, by artifice and fraud, alienates the affections of his wife, even though she continue to reside with him and serve him. If one brings about the alienation of affection of another's wife, or a separation, it matters not how far the wife was blameworthy. The wrong to the husband is the same whether the wife consented or not. Mere giving shelter to a wife who has left her husband will not raise a liability. But if any influence is used over the wife to continue the separation, or if access is denied to the husband, he may have an action. If, however, the husband has given cause for divorce, he can not be heard to complain. And if the husband in any manner connived at the seduction of his wife he can not recover damages therefor.

Where a wife receives personal injuries which incapacitate her for her duties, there are two kinds of damage, 1st, that suffered directly by the wife, 2d, that consequentially suffered by the husband. At common law, for the former, being her pain and suffering, humiliation and the like, the suit was in the name of both; and for the latter, being

the loss of society and services, the husband sued alone. In either case the amount recovered belonged to the husband. Now, however, it is generally the law that the damages in the former case inure to the wife, and only in the latter case to the husband.

CHAPTER XXXIV.

PARENT AND CHILD.

§ 452. **Legitimacy.**—Children may be either legitimate or illegitimate, according as their parents are or are not lawful husband and wife; or they may be adopted. Every child born to a wife during the continuance of the marriage relation is presumed to be the child of her husband. The presumption is not conclusive, however, and illegitimacy of the child may be established by proof, but only by clear and convincing proof. Illegitimate children born before marriage become legitimate upon marriage of their parents, but in England and a few states this is not the law. At common law, the children born of a void marriage were illegitimate, but it is generally provided by statute that if the marriage was entered into in good faith, the children shall be deemed legitimate. The common law did not recognize the adoption of children. Statutes in nearly all the states make no provision therefor. And generally upon the adoption of a child, the adopting parent and the child have all the rights, duties and liabilities that exist between natural parent and child.

§ 453. **Rights and duties of parent and child.**—The mother of a bastard has the right to custody and control, and she is under obligation to support it;

its supposed father is not liable for its support, except under special proceedings provided by statute. At common law a bastard could not inherit either from his father or mother, but by statute the bastard now in most states inherits from the mother, and in some inherits from the father in the absence of other heirs.

As to legitimate children, the duty of the parent, first the father, or if he be dead the mother, is to protect, educate and maintain the child during minority. This duty resting upon the parent is legally a privilege rather than a duty, for the law only permits, but does not compel, the parent to perform it. No action is permitted by a child against a parent for any failure in these duties, even though the failure may be criminally punishable. By way of compensation for, and in aid of the parent's duties, the law gives to the parent the custody, control and services of his minor children. He may moderately and reasonably correct or restrain the child. So long as he is a fit person, he is entitled to the custody of the child. All rights and duties as between parent and child end with the majority of the child or emancipation, *i. e.*, the agreement, express or implied, of the parent and child that the child may be treated as an adult.

A parent is not liable for wrongs done by the child to other persons, unless done by the parent's direction, or in his service. Of course, a child can not be held liable for wrongs done by its parent.

§ 454. **Wrongs as between parent and child.**— Whether a parent will be civilly liable for personal wrongs done to a child is not wholly settled. By some text-writers it is stated that there is no civil lia-

bility, so far as assault and battery or imprisonment is concerned, it being deemed safer to rely upon the natural affection of a parent.

For any wrongs done by a parent to the property of his child, he is answerable the same as he would be to any other person.

For any injury done by a child to its parent, whether to the person or property, the child will be civilly responsible to the same extent as it would be to any other person.

§ 455. **Wrongs by third persons.**—Whenever a third person does an injury to a parent or a child, there is a double loss, direct to the one, and consequential to the other. And the question is how are such wrongs done, and for what loss is the wrongdoer held responsible. These will be considered separately.

§ 456. **Child's interest in the parent.**—In the relation of parent and child, the general rule applies that the inferior has no rights in the superior, hence a child has no such interest in the parent as will support a suit by the child to recover for injuries to the parent. The only exception is in cases of injuries causing death, when the statute gives a right of recovery to the personal representative for the benefit of wife or child. This has been considered elsewhere.

§ 457. **Parent's interest in the child.**—The parent is entitled to the services of his child, and all the profits to be derived therefrom until majority. Whoever incapacitates the child from rendering the service, causes legal damage to the parent, and is subject to an action. The right to recover is based on the

right to services and the duty to protect. At common law the parent recovered only to the same extent that a master would recover for loss of services of his servant.

Damage to the parent may arise by injuries that diminish the child's ability to serve, or by wholly depriving the parent of its services; and the latter may occur by enticing the child away or by causing its death. The last named wrong has been treated in a former section.

§ 458. **Physical injuries to the child.**—Any one who by a wrongful act injures the child so as to deprive the parent of its services, or to cause loss through care and attendance upon it, is liable to the parent therefor. If the injury is of a continuing nature, the parent recovers not only the value of the services actually lost, but for the deprivation or impairment of services up to the age of twenty-one. In estimating the value of services the expense of supporting the child must be considered. It is only for loss of services that the parent recovers; for mere loss of happiness, comfort and society of the child, except so far as they can be viewed as services, there can be no recovery. The parent's anxiety, grief and sympathy for the child's injury are not elements of damage in a legal sense. For the child's suffering, mental anxiety and permanent injury or disfigurement, the parent has no right of action for his own benefit, the action for all such damage being in the name of the child itself and the recovery being for its own benefit.

§ 459. **Enticing away the child.**—The parent is entitled to the custody as well as the services of the

child; and if a wrong-doer get possession of it, the parent may by legal proceedings have it restored to him.

Whoever by force or artifice takes a child away from its parent is liable to the parent for the loss of its services. The recovery in such case is based upon the relation of master and servant, rather than upon the parental relation. For if the parent has emancipated the child, that is, given to it the right to enjoy all the profits of its services, so that there is no longer the relation of master and servant, there is no right of recovery in favor of the parent.

§ 460. **Seduction.**—The wrong by seduction of a female child has some elements that distinguish it from other wrongs. The law has labored under some difficulties from which it has emerged but slowly. Under the common law the right of action was based purely upon the parent's right as a master to the services of his daughter as a servant. It followed from this, that while he could recover against a seducer, if his daughter resided at home, or was not actually in the service of some one else, he could not recover if another person were lawfully entitled to her services by contract. The law permitted the father to recover for the shame and humiliation consequent upon the seduction, but only in cases where he was entitled to recover on account of loss of services. Consequently, when she was in the service of another, the only damages recoverable were the loss of her time and the expenses, and these were recoverable by the person who was entitled to the service or who paid the expenses. The anomaly was that the action was made to depend upon loss of services,

which generally were merely nominal, whereas the real injury for which the substantial damages were given was the shame and disgrace.

To remedy this inconsistency statutes have been passed in most of the states giving the parent a right of action for the seduction of the daughter, whether or not the daughter be living with the parent, or the parent be entitled to her services. A further right of action is given to the woman seduced to sue for her own seduction.

CHAPTER XXXV.

GUARDIAN AND WARD.

§ 461. **Kinds of guardianship.**—A guardian is one who has the care and management of either the person or property, or both, of a child during minority. At common law there were many kinds of guardianship, which have become obsolete. In the United States at present the law relating to guardianship is much the same for all the states.

The following are to be considered: 1st. Natural guardians. 2d. Testamentary guardians. 3d. Legal guardians. 4th. Guardians *ad litem*. 5th. *Prochein ami* or next friend.

§ 462. **Natural guardian.**—By this is meant the father, or, on his death, the mother. None other can be natural guardian. The natural guardian has control of the person of the child, but not of its property. The title is, in fact, nothing more than another name for the natural right of a parent to the custody and control of the child. It adds nothing to the legal right. There is no action that may be brought for an infant by natural guardian, and whenever a parent sues as such on account of any injury to the child the recovery is for the benefit of the parent only.

§ 463. **Testamentary guardian.**—By this is meant the person named in a parent's will to be the guard-

ian of a child. Such person simply has a preference to be appointed the legal guardian, if all other things are equal. He has no powers unless appointed by the court, and when legally appointed his status is that of an ordinary legal guardian.

§ 464. Legal guardian.—By this is meant the person appointed to be guardian by the court having jurisdiction. Generally the father has the preference, then the mother, then the next of kin in order. The legal guardian always has exclusive control of the ward's property and sometimes of the ward's person. So long as the parent claims the custody of the child's person, the legal guardian has no right to it. But if the parents are dead, or unfit, the legal guardian is entitled to custody.

The guardian's duty is to see that the ward is cared for and properly educated. As to the ward's estate, the guardian is bound to exercise care and diligence in managing it; must account from time to time to the court appointing him, and upon maturity of the ward must pay over and deliver to the ward the entire estate. The guardian is held to strict accountability. Unauthorized acts of the guardian may be adopted if beneficial, or rejected if detrimental to the estate; and a guardian is not permitted to reap any personal benefit whatever out of the management of the estate, except what is allowed by the court as compensation for his services. Frauds of the guardian have been treated in a previous chapter.

Among the guardian's duties are the collection of debts and the defense of all suits against the ward. What suits must and what may be brought in the name of the guardian for the infant, is regulated by

statute in the several states. In cases where the law does not permit the guardian to litigate for the infant or where though entitled he refuses to do so, it is generally provided that the action or defense may be made for the infant by guardian *ad litem* or next friend.

§ 465. **Guardian ad litem.**—After a suit is begun against an infant, and the infancy is disclosed to the court, the court will see to it that he is represented by a guardian. Whenever the legal guardian appears for the infant a guardian *ad litem* is usually not necessary. But in absence of the legal guardian the court appoints a guardian for the purposes of that suit only—a guardian *ad litem*. He is an officer of the court, may be removed at pleasure, has no power over the infant's person or property, has no power to admit or waive anything; his functions being only to see that the infant's case is fully presented to the court for decision. The guardian *ad litem* is always for the defense.

§ 466. **Next friend.**—An infant is not permitted to maintain an action in his own name solely, if his disability is brought to the attention of the court. Wherever the legal guardian can not or will not bring suit for the infant, the infant must be represented by his next friend. The infant may select, if he wishes, or, if suit is brought before the infant has selected, the court may appoint the next friend. Any one may act as next friend; it is not confined to kin. The next friend is subject to control of the court, and may at any time be removed by the court and another appointed. One purpose in requiring a next friend for an infant

is that there may be some one responsible for the costs of the suit. The next friend is liable for costs while the infant is not. It is usually provided that there need be no next friend, where an infant is a joint plaintiff with adults.

§ 467. **Rights of guardian and ward in each other.**—A guardian has no right to the services of a ward, and unless the relation of master and servant exists, can not recover for his own benefit any damages on account of injuries to the ward.

A ward has no interest in the guardian's services that will sustain an action by the ward against one who injures the guardian.

§ 468. **Wrongs between guardian and ward.**—As between each other, guardian and ward are answerable for injuries done, to the same extent as if the relation did not exist. Except, however, that where the guardian has custody of the ward's person, he stands in *loco parentis* and has a larger right to restrain and correct the ward. And also, where the influence of the guardian is misused, the relation enters as a factor into the duty owing and the wrong done. This is shown in the chapter on frauds.

§ 469. **Guardian of the insane.**—Analogous to the guardianship of infants is the guardianship of the insane.

It is generally provided by statute that upon a judicial determination of the insanity of a person, the court may appoint a guardian to take charge of the person and property of the insane. The duties of such guardians are the same in general as those of guardians of infants, and they are held to like ac-

countability. It is their duty to appear for and defend suits against their insane wards.

The guardianship may be terminated upon the restoration to sanity of the ward, which fact must be judicially determined in the same way that insanity was determined.

CHAPTER XXXVI.

MASTER AND SERVANT.

§ 470. **Growth of the relation.**—The relation of master and servant may exist between father and child, guardian and ward, husband and wife, or in fact between any persons capable of contracting. The relation arises out of contract made between them, by which the master acquires a legal authority and control over the servant. Originally, it was only a family right of no great importance, the servant always being a member of the master's household. But with the vast development of business enterprises, the relation has been expanded to enormous dimensions, and is now one of the most important in the business world. It applies to every form of occupation in which one person's work is subject to the control and direction of another to whom he is responsible.

§ 471. **Apprentices.**—An apprentice is one who is bound out to a master to learn some trade, business or profession, the master being also bound to instruct and initiate him in the occupation. An apprentice may be either an adult or a minor. So far as an adult is concerned, he is bound by whatever contract he makes, and his rights and liabilities must be determined therefrom. So far as infants are concerned,

the matter is regulated by statute in the several states which must be exactly followed. It is usual to require the articles of apprenticeship to be recorded, and they must be signed by the parent or guardian, or in their absence they must be approved by the probate court. If the infant is over fourteen years of age, his assent and signature are generally required. The master acquires some of the rights of a parent over the infant apprentice, such as the right of moderate restraint and punishment, and being in *loco parentis* the master must care for the training, health and safety of the apprentice. In other respects, the rights and liabilities are the same as for ordinary masters and servants.

§ 472. **Who is a master or servant?**—It is not necessary that there be a definite term of service, nor that any wages be paid or due. And the relation may exist even where the services were volunteered, if they were of such nature that a contract can be implied. The test in all cases is the sort of control that is exercised over the work. The relation of master and servant exists when one has the right to control and direct the work of another who is employed to render personal service otherwise than in pursuit of a separate calling. The employer may contract that the employe shall undertake to bring about a certain result and shall assume all responsibility for the means and method of the work. In such case the employe is not a servant, but an independent contractor.

§ 473. **Independent contractor.**—A person is not a servant, but an independent contractor, who is employed, but is not subject to the order or control of the

employer as to the method or means to be taken in doing the work. The general rule is that an employer is not responsible for the acts of an independent contractor. If, however, the employer dictates the method, or retains any direction or control over the contractor, he will to that extent be answerable for any injuries traceable to him. And if the work is unlawful in itself, or must necessarily cause the damage, the employer may be held liable jointly with the contractor. An independent contractor's liability to the employer for wrongs is no different from that of any stranger, except that he is bound to perform his contract.

§ 474. **The contract between master and servant.** —A general hiring without limitation is at common law a hiring by the year. From custom, or from the times of payment, the period may be held to be monthly, weekly, or daily. If the time is expressly fixed, it controls, and both master and servant are bound to the performance of the contract. If the contract is for doing what is illegal it is void; so, also, if the hiring is for an immoral purpose; and if any essential part of the consideration is illegal the whole contract is void. Contracts for personal services can not be specifically enforced, nor can they be assigned or transferred without consent of both parties. Such contracts are always subject to the implied condition that the person shall be able to perform the service, and if he is disabled without his fault he is excused from further performance. In the absence of stipulation or statute to the contrary, wages are payable at the end of each term of service.

§ 475. **Termination of the relation.**—In addition

to the termination by expiration of the time of service, or the death or disablement of either party, the contract of service may be put to an end, (1) by the master's discharging the servant, or (2) by the servant's abandoning the service.

§ 476. **Discharge by the master.**—The master may discharge the servant for sufficient cause. Just what is sufficient cause must depend upon the facts in each case. Generally, however, it is sufficient cause for discharge that the servant is guilty of disobedience, immoral conduct, incompetency, habitual negligence, drunkenness, fraudulent conduct and the like. In case of discharge for cause the general rule is that the servant is entitled to payment for what he has done up to the time of discharge, but is not entitled to any damages for the unexpired term.

If the discharge be without good cause, the servant is entitled not only to payment for the work actually done, but to damages for the loss of his wages during the unexpired term. He is bound, however, to seek other employment. The measure of damages therefore is the unpaid balance of wages for the entire period, less what he might have earned elsewhere.

§ 477. **Abandonment by the servant.**—The servant is justified in abandoning the service, if he suffers ill usage at the hands of the master, or if the master refuses to allow him to work. These faults of the master are equivalent to a discharge, and the liability is measured accordingly.

Sickness or inevitable accident disabling the servant will justify an abandonment by the servant, but

will entitle him to payment only for what he has actually done.

For an unjustifiable abandonment of service by the servant during a term of service, it was formerly the rule that as the price was entire and to be paid for the whole service, there could be no recovery for a part. The rule now in many states is that the servant may recover a proportionate part of the wages, less whatever damages the abandonment caused to the master.

§ 478. **Wrongs independent of contract.**—We pass now to the consideration of the tortious wrongs that involve the relation of master and servant. Such wrongs may create liability in the following ways, which will be considered in order :

1. Liability of third persons to the master.
2. Liability of third persons to the servant.
3. Master's liability for injury to others.
4. Servant's liability for injury to others.
5. Master's liability to servant for injuries (a) by master, (b) by persons for whom the master is answerable.
6. Servant's liability to master for injuries (a) to the master, (b) to others.

§ 479. **Liability of third persons to the master.**—A master has an action against one who wrongfully entices away his servant or prevents the performance of the servant's duty to the master; and this even though the relation of master and servant be determinable at will. One who harbors another's servant, intending thereby to wrongfully deprive the master of the service of the servant, may be liable. Where the wrong is one causing direct loss to the servant and consequential loss to the master, as in the case

of personal injury to the servant, each may recover for his own damages.

§ 480. **Liability of third persons to the servant.** —A servant being the inferior has no such interest in the master as will sustain an action by the servant for consequential damages from an injury to the master. The servant has a right of action against any one who by wrongful acts procures his discharge provided he can show damages.

§ 481. **Master's liability for injury to others.**— The question here is, for what acts and omissions of the servant is the master liable to other persons? That the master is liable at all is upon the maxim, "He who acts through another acts himself." The wrongs done may have been either intended or unintended by master or servant, and the servant may have acted in violation of or obedience to the master's orders. The persons injured may be strangers, to whom no special duty was owing, or persons to whom the master was under special obligation, such as passengers or guests at inns. Upon the nature of the wrong and the kind of duty owing depends the liability of the master.

§ 482. **Intentional and unintentional injuries.**— The general rule is that where the servant's acts are within the real or apparent scope of his employment, the master is responsible; otherwise not. Hence for willful and malicious acts of the servant the master is not generally liable, for such acts can not be supposed to be authorized. The rule for liability becomes more stringent, however, if the master is under some special duty to the injured person, as in case of a passenger, and has delegated the performance of

that duty to the servant. In such case the master is responsible for all injuries done by the servant, during the time of the service; hence the master may be liable even for malicious acts done in express violation of orders.

§ 483. **Servant's liability for injuries to others.**—For any negligence or unlawful act of a servant he is liable to the person injured whether the master is liable or not, and no matter what is the relation of the injured person to the master. There are cases in which the servant and master are both held liable, but in which, as between themselves, the master is liable over to the servant for any loss suffered by the servant. In such cases the servant must have acted in good faith and in obedience to the master's orders.

§ 484. **Master's liability to the servant.**—First, as to injuries by the master himself. While it is a privilege of the master to give a "character" for the servant, the servant suffers no legal damage if the certificate is refused, even though the refusal be arbitrary and unjust. For any injury resulting to a servant from the direct personal act of the master, the master is liable to the servant the same as though no such relation existed. For any failure of the master to perform the duty he owes to his servant, he is liable to the servant if injury results therefrom.

§ 485. **Duties of master to servant.**—The master owes the duty to his servant to exercise ordinary care in the following respects: In providing and maintaining a safe place to work and safe appliances to work with, in taking due precautions to prevent accidents, in guarding the servant against dangers unknown to him, in refraining from exposing the

servant to unnecessary or unknown dangers, in employing as his fellow-servants only competent persons, and in employing these in sufficient number. These are the principal duties, though others might be named. If the master exercise ordinary care in discharging his duties, he is not liable, though the servant be injured.

§ 486. **Risks assumed by servant.**—The servant assumes all risks that he ought to know are incident to the discharge of his duties, all risks from negligence and wrongs of his fellow-servants, and he is bound to use care himself. To some extent the servant will be excused for incurring a danger under order of the master, but not if the danger be glaring, nor if it is fully known to the servant and voluntarily assumed. As a general rule, where the opportunities of the servant for discovering danger are equal to the master's, the master is not liable.

§ 487. **Fellow-servants.**—If the master has exercised due care in selecting and retaining servants, he has done his duty. If, nevertheless, injury results to one servant by the wrongful act or omission of another servant, the master is not liable. It is essential, however, that the servants shall have been within the same general employment, for if two servants are engaged in occupations wholly independent of each other, they are not fellow-servants. And it is to be further noted that the fellow-servant rule applies only to the servants personally; so that if the wife or child of a servant be injured by another servant, the master is held liable for both the direct and consequential injury.

§ 488. **Vice-principal.**—If, however, the person

causing injury to the servant be discharging a duty which was owing from the master himself to the servant, he is regarded to that extent as the master. The name usually given is vice-principal. For any failure to discharge the duties he owes to his servant the master is liable, whether the act or omission which causes the injury be his own or his vice-principal's. A person may at the same time be a vice-principal and fellow-servant; the character of the act done determines in what capacity he acts.

§ 489. **Servant's liability to master.**—For any wrongful act, neglect or incompetency of a servant, which causes injury to the master's person or property, the servant is liable to the master, provided the master is not also in fault. If a servant exceeds the authority conferred upon him by the master, and so involves the master in loss the servant is liable. And a servant is liable to the master for any damages which the master has been compelled to pay to a third person on account of the wrongful act or default of the servant, provided the master is himself free from fault.

CHAPTER XXXVII.

WRONGS TO INCORPOREAL PROPERTY.

§ 490. **Incorporeal hereditaments.** — Incorporeal hereditaments, or inheritable rights issuing out of corporeal property, have been described in a former chapter. These rights partake of the nature of the things out of which they issue, but, since the rights themselves can not be seen or handled, it is evident that they are incapable of direct injury. Whatever injury is done must be consequential. Hence the remedies for direct wrongs are not applicable to incorporeal hereditaments. If one has a right of way across another's land, and it is interfered with so that he is deprived of its use, his remedy is not by ejectment, but by an action for the consequential damages or by an injunction. But where the consequence of a wrong to an incorporeal right is also an injury to corporeal property, the remedies as for a direct wrong may be had. For instance, every landowner having an easement for lateral support, if his neighbor willfully and maliciously takes away the support and causes the land to fall, the owner may treat it as a direct wrong done by force to his land.

§ 491. **Other incorporeal rights.**—There is an important class of incorporeal rights which do not issue out of property in the sense that incorporeal hereditaments do, but on the contrary are the source out of

which the tangible property arises. This class embraces the subjects of copyrights, patents and trade-marks. Public policy and the sense of justice dictate that one who creates anything should be permitted to enjoy the fruits of his labors. It is evident that in case of copyrights, patents and trade-marks, the substantial benefit to be derived by the creator of the thing in question lies in his having the exclusive right to reproduce or use it.

§ 492. **Statutory provisions.**—The constitution of the United States gives power to congress to secure to authors and inventors the benefit from their creations, for a limited time ; and congress has passed acts for the purpose. Just what the provisions are as to the steps to be taken, it is not now material to inquire. Whenever the formalities prescribed are observed the writer or inventor has a monopoly for the period provided, and may have his remedy against one who infringes his right. He may procure an injunction, recover damages he has suffered, and recover profits made by others.

§ 493. **Patents.**—Without entering into the details of patent law, a few general principles may be stated. A patent is given for an invention, namely something created by man. Natural processes and principles can not be patented. The thing must be new and useful. A new method of combining things to produce results may be patented.

Infringement of patents may consist in making, using or selling the thing that is substantially covered by the patent. The person infringing may be held liable, whether he knew or did not know the

article was patented. An exception is made in favor of persons making or using the article for purposes of experiment only.

§ 494. **Copyrights.**—The copyright laws apply to printing of any kind, pictures, music and statuary, and confer upon the author the exclusive right to make, use or sell copies or the originals. The exclusive right extends to the whole as well as every substantial part of the thing copyrighted. So that, if there is a copy or imitation of any substantial part, it will be an infringement. As to what is a substantial part, the facts in each case must determine. The size of the part taken is not a decisive test, for the true value may be in the small part taken. For purposes of criticism, parts may be quoted, but if the review is a pretense for publishing a substantial copy, it is an infringement.

Whoever infringes the copyright of another is liable, whether it is done innocently or not. The intent is in general immaterial.

§ 495. **Rights independent of statutes.**—The monopoly granted under the copyright statute is enjoyed by the author after publication. Before publication, however, an author has legal rights in the product of his intellect, and these rights were recognized before the copyright statutes.

At common law, so long as an author did not publish his work to the world or abandon it to the public, he retained the right as property to make such use of it as he saw fit. He might, without losing his right, permit others to make a limited use of it. Whoever without the author's consent used his work

in whole or part was liable to the author in damages and could be enjoined.

§ 496. **Private letters.**—Where letters have a literary value the writer has the sole right to publish them, even though the legal title to the paper is in the recipient. If it is apparent that they were intended for publication, the recipient may also publish them. Any attempt by others to publish them may be restrained by injunction, or damages may be recovered for the publication. So far as a letter has value for historic purposes the recipient may use it. And all papers of every kind may be used by any one as evidence in any suit, no matter what may be their value.

§ 497. **Trade-marks and trade names.**—A trade-mark is a name, symbol or device used by a person to designate that certain goods or property are made by or used by him only, or that a particular business is conducted by him. The essential quality of a trademark is that it is arbitrary in form. If the mark is descriptive of any quality of the goods it is not valid as a trade-mark. It is intended as a simple and convenient guide to customers. Whoever imitates the trade-mark and so palms off goods under false colors, commits a fraud upon the purchaser, and at the same time causes damage to the owner of the trade-mark, both by the profits he has lost and it may be by the injury to the reputation of his goods. This the law recognizes as a substantial damage, and the trade-mark is regarded as incorporeal property. The law of trade-marks is of comparatively recent origin, although the principles upon which it rests have been long settled as a part of the common law.

The remedy for infringement of trade-marks is practically the same as for infringement of patents, viz., damages for loss of profits, injunction, and recovery of the profits made by the infringer.

In the United States recent statutes have been passed authorizing the registry of trade-marks in some cases, and giving them greater value as evidence when registered than when not. The statutes are generally only declaratory of the common law, and all the remedies that formerly existed are preserved.

Though not a trade-mark technically, a trade name or sign will receive protection from the courts if it is not merely descriptive and contains no deceptive words or meaning, and a rival may be enjoined from using such name or sign so as to cause injury to the owner. By means of such trade names what is called the good will of a business is preserved and becomes a valuable property right.

CHAPTER XXXVIII.

WRONGS TO PERSONAL PROPERTY.

§ 498. **Kinds of injuries.**—Wrongs that may be done to the owner of personal property through fraud, negligence and nuisance have been considered; as have also the wrongs that may be done by mere breach of contract. There remain to be considered wrongs:

(1) By direct force injuring or disturbing the owner in his possession.

(2) By conversion or depriving the owner of his property.

(3) By neglect to restore to the owner upon demand property to which he is entitled.

§ 499. **Trespass by force.**—The first class of the wrongs named is known as a trespass by force or *vi et armis*. By this is intended only a direct injury by the unlawful forcible disturbance of another in his possession of the property. This may amount to a partial or complete destruction of the property. The wrong going only to the possession, it follows that one who has an interest in the property, but has not actual or constructive possession, is not entitled to complain of an injury as a trespass *vi et armis*, but the injury as to him should be redressed in some other form, as will be seen.

500. **Possession.**—The possession referred to may be (1) that of the general owner, (2) that of one having a special property, as a bailee, mortgagee, etc., or (3) that of one having no title beyond mere peaceable possession. The possession of a servant or agent is in law the possession of the master or principal, and need not be considered as a distinct possession.

Possession need not be actual. If one has the immediate right to possession, he has the general property and is said to have constructive possession. He may maintain an action for trespass against any wrong-doer, except the person who has the special property and actual possession.

Where there is a special property in goods, either the general or special owner may sue a third person for injury to the goods.

One who has mere peaceable possession has sufficient possession to warrant a suit for trespass against any wrong-doer except the owner.

§ 501. **The force.**—The force used may be by the wrong-doer personally, by his servants, or by his animals. It may be either express force, as in robbery, or implied force, as in the act of placing poison before animals. The degree of force is immaterial. To cut a rope tying a cow would be a trespass. It must moreover appear that the injury was proximate.

§ 502. **Conversion.**—Any distinct act of dominion wrongfully exerted by one person over another's property, in denial of his right, or inconsistent with it, is known as a conversion. It is the denial of the owner's right that distinguishes conversion from trespass, for trespass may sometimes be committed

even though the owner's right to property and possession be fully conceded. Whether the act be for the benefit of the wrong-doer or a third person, and whether it be for a temporary purpose or otherwise, it is a conversion, if the dominion of the owner be intentionally interfered with. It follows from this that many wrongs that are trespasses may, at plaintiff's option, be treated as conversions. Anything that is personal property, even though it have no value except to the owner, may be the subject of a conversion. Whoever has the mere possession of goods, provided the possession was not gained by force or fraud, is entitled to maintain an action for conversion against any one except the owner. And any one who has not the actual possession, but who has the right to immediate possession, may maintain the action.

§ 503. **Conversion by persons rightfully in possession.**—When a person who has a special property in goods, as a bailee, mortgagee, etc., does any act in excess of his authority, and inconsistent with the rights of the general owner, his acts may be treated as a conversion. If a mortgagee should sell the mortgaged property, as his own, and in denial of the mortgage it would be a conversion; if sold subject to the terms of the mortgage, however, it would not be.

Whoever buys the property must ascertain the title, and if he takes possession and denies the owner's right, he is liable for conversion. The question of good faith is not involved. All who participate in the conversion, as seller or buyer, principal or agent, may be held liable. But if one is innocently in possession of goods belonging to another, and, before

notice of the true owner, surrenders them to the person from whom he received them, he will not be liable for conversion. And if, after notice of the true ownership, he surrenders possession upon demand to the owner, he will not be held liable either to the owner or the person from whom he received them.

§ 504. **Demand for possession.**—It is a general rule that where one has obtained possession of goods by force or fraud, it is not necessary to demand possession from the wrong-doer before bringing suit; and when the possession was originally rightful, but there has been such abuse or excess of authority that the whole becomes wrongful from the first, no demand need be made. If, however, one has rightful possession and does not deny the owner's title, it is essential in order to maintain the action that a demand shall have been made for possession, and a refusal to deliver. Such demand and refusal need not be express; they may be implied from conduct. An attempt to take the property is usually a sufficient demand, and opposing the attempt is a sufficient refusal.

§ 505. **Conversion by tenant in common.**—As each tenant in common has a right to possession of the thing held in common, there can not be a conversion by one who merely withholds possession from the other. But anything that amounts to a loss or destruction of the property by fault of the one in possession may be a conversion. So it is generally held that a sale would be. In some states it is held that if the property be in its nature divisible, a de-

mand by one owner for his share refused by the other would be enough to establish a conversion.

§ 506. **Legal process.**—Whenever property is interfered with under color of legal process, the person interfering must confine himself within his lawful powers, and for any excess he may be held liable as for a conversion of the property.

An officer of the law may without process take a thief together with the stolen property, or when he arrests a felon may take his weapons. But generally, in order to take property he must have process. When acting under legal process he can not be held liable as for conversion, if the process be issued by a court having jurisdiction, and be on its face without suspicious earmarks, and if he substantially follows the command of the writ. If he exceeds or violates the command of the writ, as for instance by selling without notice or injuring the goods, he may be held liable for the conversion.

A magistrate is liable for issuing process if he acts knowingly without jurisdiction, and a party who knowingly sets a magistrate or officer in motion to act without authority is liable. If property is sold at a judicial sale upon a void judgment or void process, the purchaser may be liable for conversion.

§ 507. **Remedies.**—The remedies permitted by law for injuries done to personal property are the following:

1. Recaption, *i. e.*, the act of the owner in retaking possession without suit. This he is permitted to do provided he does not commit a breach of the peace, or trespass upon the lands of one who is not the wrong-doer.

2. By an action at law. The forms of action under which redress was given at common law were: Trespass, to recover damages for direct injuries to property; trover, to recover damages for the wrongful taking or detention of property; detinue, to recover the possession of the property itself; replevin, to recover the possession as well as damages for taking property. Where the injury was indirect or consequential, the action was in "trespass on the case."

3. In some cases a court of equity granted an injunction to prevent the doing or continuance of injury.

The remedies named substantially exist in all the states; the forms of the common law action have, however, been more or less modified and simplified by statutes. As a rule, the action being personal redress may be had wherever jurisdiction can be acquired over the wrong-doer, regardless of the place where the property is or the wrong was committed.

CHAPTER XXXIX.

WRONGS TO REAL PROPERTY.

§ 508. **Ownership.**—The owner of real estate is entitled to dominion as against all the world; the person in possession is entitled to dominion as against all but the one having a better right. Whoever interferes with his dominion may be treated as a wrong-doer. The injuries that may be done to an owner as to his real estate may be 1st, by putting or keeping him out of possession; 2d, by injuring his land while in his possession.

§ 509. **Dispossession.**—Under the common law a classification of the wrongs of dispossession included some which, by reason of changes in the law, are now of little importance. Abatement, *i. e.*, where on the death of a person a stranger entered before the heir, and intrusion, *i. e.*, where a stranger entered before a remainderman or reversioner, were wrongs that now do not differ in legal effect from any other unlawful taking possession of land in absence of the owner. The reason for the former classification as distinct wrongs lies in the fact that formerly no ownership was full and complete without an entry; now, however, there is no interval and the title and complete ownership vest immediately. The wrong of disseizin, *i. e.*, entering upon land and depriving the owner of his possession, is the equivalent

of all wrongs wherein the entry was wrongful from the beginning, and continued to be so. The wrong may be committed by one who gains possession for a limited purpose and wrongfully exceeds the authority granted, whereby the entire possession is held to be wrongful from the beginning.

§ 510. **Unlawful detention.**—Where the original taking possession was not unlawful, but the wrong consists in detaining the possession, this is likewise a dispossession of the owner. This may happen, in case of a lease for a definite term or during the life of another person, by the expiration of the term or by the death of the person; the tenant then holding over without right. It may also happen in case of an estate upon condition where the non-performance of the condition forfeits the estate, and the tenant nevertheless holds the land.

§ 511. **Remedies.**—An owner's remedy for being deprived of possession of real estate may be by his own act or by legal process. He may by his own act enter upon and take possession of the land, provided he does not thereby commit a breach of the peace. He is not allowed the remedy by his own act, if the holder of the land has an apparent right to hold it, but in such cases the owner must resort to his remedy by action at law.

Under the common law various forms of action were used for the recovery of real estate, but by judicial decision and legislative enactment, these forms have been gradually displaced and most of the law relative to them is obsolete. Under modern law the almost universal remedy for trying the title to lands is the action for possession, and this has been so simplified

that it does not correspond to the cumbersome forms that prevailed under the old law. Where the title to the land is not in question, but only the right to possess it, a simple and prompt remedy is generally provided in an action before a justice of peace for possession. An owner who has been deprived of possession is entitled by an action for damages to recover the profits of the land during the time the wrong-doer held possession, and it is usual to combine the claim for damages with the suit for possession.

§ 512. **Injuries to land without dispossession.**—The wrongs to real estate that have been enumerated have been by depriving the owner of possession; it remains to consider how the owner's land may be damaged without affecting his title or possession. These wrongs may be done (1) by the tenant in possession to the damage of another who has an interest; or (2) by a stranger. Wrongs of the former class are called waste; of the latter class, may be either nuisance or trespass by breaking the close. These will be discussed in order.

§ 513. **Waste.**—Waste is the doing or permitting lasting damage to the property by the person in possession, to the injury of some other person who has an interest therein. It may be committed, for example, by a life tenant as against a remainderman. The interest which qualifies one to complain of waste must be a vested interest.

§ 514. **Kinds of waste.**—Waste may be voluntary or permissive. Instances of voluntary waste are: Pulling down houses in whole or part, cutting valuable timber, removing a material part of the soil. In general a tenant is answerable for waste, even

though the act be done by a stranger, but he has his remedy over against the stranger. Permissive waste arises by negligence. Where the tenant is under obligation to keep the premises in repair, but negligently suffers the premises to became ruinous, it is waste.

§ 515. **Remedies.**—At common law waste worked the forfeiture of the estate of the tenant; and such is still the law in some states. The most usual forms of remedy are the action for damages and injunction to prevent threatened or continued waste.

§ 516. **Nuisance affecting land.**—The nature of nuisance has been shown in the chapter treating of that subject. So far as relates to its effect upon real estate, a nuisance must cause some material and sensible injury to the property or its value. Anything done upon neighboring property, or upon highways so as to injuriously affect the property, may be deemed a nuisance. To unreasonably occupy the street in front of one's place of business and block the path, to carry on offensive business so that the property becomes uninhabitable, or to do anything whereby the crops or trees on land are blighted is a nuisance.

§ 517. **Remedies.**—The redress for nuisances causing damage to land is not different from that for other nuisances. The land-owner may abate the nuisance, if he acts reasonably and without breach of the peace. He may recover damages and judgment abating the nuisance, or he may have injunction.

§ 518. **Trespass upon land.**—In the wrongs of nuisance the wrong-doer causes indirect or consequential injury without going upon the property itself. Where the injury results from the wrong-

doer going upon the land, the wrong is called a trespass by breaking the close.

The owner, or the person in possession who is regarded as the owner, is entitled to exclusive dominion over the land. He may repel any one who attempts to infringe his right. For his protection the law supposes that every man's land is inclosed, whether there actually be a fence or not; and whenever the boundary line is crossed it is assumed that the close is broken and that damage has resulted. It may be generally stated, that every one who crosses the land-owner's boundary line is a trespasser by breaking the close unless he does so by lawful authority.

§ 519. **The boundary line.**—The boundary of land extends perpendicularly to the center of the earth and to the sky. Technically, an aeronaut would be a trespasser. Where the land is adjacent to a highway, the rule is generally that the line extends to the center of the highway. The land-owner owns the soil underlying the highway, subject only to the public easement. Consequently, he may treat as a trespasser one who violates the easement, and he may recover against the public itself if additional servitude is imposed. If the land is adjacent to a stream, the line extends to the center of the stream, or, if a fresh water navigable stream or lake, to low-water mark only.

Any one who takes trees or herbage from the highway, or its soil, or who deposits material in the highway, or who cuts ice from a stream, may be liable as a trespasser to the adjacent land-owner.

§ 520. **Who may be a trespasser.**—It is not essential in order to make a man a trespasser that the

whole of his person shall cross the line. If any part of his person or anything physically under his control pass the line it is sufficient. So, too, a man is answerable for the trespasses of his cattle, and for the trespasses of persons acting under his authority.

521. **Lawful authority.**—An enumeration of the cases where one has no right to cross a land-owner's line would be too large; the law can be more easily ascertained by examining the cases where one is justified in entering. The right to enter is in law known as a license. License may be given (1st) impliedly by the owner, (2d) expressly by the owner, or (3d) by the law. These will be considered in the order stated.

§ 522. **License impliedly given by the owner.**—A dealer who exposes goods for sale impliedly authorizes the public to enter his store; artisans, physicians, lawyers, who hold themselves out as ready to serve others, impliedly invite the public to enter. The owner of an easement has implied license to enter and repair it. And where a land-owner sells goods or is in wrongful possession of another's goods, there is an implied license to enter. Whoever holds himself out in any way to naturally attract others to enter impliedly invites them to do so. Every land-owner impliedly licenses his neighbors and strangers to enter for any proper occasion, as business, social visits, to make inquiries and the like. The nature and extent of this implied license is controlled and measured by the kind of premises, the purpose of the entry and the general custom of the community.

§ 523. **Express license by the owner.**—A mere license exists wherever the owner grants to another a

right to enter, without giving him an interest in the land. Such a license is personal to the licensee and it is subject to revocation by the land-owner at any time before it is acted on. But when acted on by the licensee, it is irrevocable to the extent it has been acted on, though it may be revoked as to the part not acted on

If the license is "coupled with an interest," as it is called, it can not be revoked. For instance, if a land-owner sell cattle on his land, giving the right to the owner to leave them for a certain time, visit them daily and take them away, the land-owner can not revoke the license.

§ 524. **Effect of statute of frauds.**—The rule that a license acted upon becomes irrevocable has been carried to the extent of practically overriding the statute of frauds in one respect. The statute of frauds provides that no conveyance of land or any interest therein shall be valid unless in writing. Nevertheless, it often happens that men will grant to each other licenses by parol to enjoy interests in each other's lands, and in face of the prohibition of the statute, will act upon them. This is especially noticeable in the matter of parol licenses to overflow land for mill purposes. By acting on this license, the licensee acquires an interest in the overflowed land, which the statute says is void because granted verbally. Yet the injustice of allowing the land-owner to revoke his license, after the licensee has incurred great expense on its faith, is so glaring that courts of equity will enjoin the revocation.

§ 525. **License by law.**—This sort of license is of

an entirely different nature from those that have been considered. It arises not out of the consent of the owner, either express or implied, but on the contrary often exists contrary to the intent of the owner. It rests upon motives of public policy and the general welfare of the community.

For example, in time of conflagration or other public calamity, officers and even private persons are justified in entering on any premises or into any building necessary or reasonably convenient to check the disaster; and they may do any damage that is reasonably necessary even to the extent of a total destruction.

If for any reason a public highway becomes impassable a traveler has a license by law to pass around the obstruction by going over the adjacent land, and for that purpose may remove a fence.

§ 526. **Legal process.**—Officers charged with the execution of legal process have a license by law to enter upon land when necessary to do so. Ordinarily the license extends only to the land and not to the dwelling-house, which is regarded as the castle of the owner. But in case of felony or breach of the peace the officer may also enter the house, and if need be break open the door to effect an entrance. So, also, if the command of the writ necessarily involves entering the house, as in the case of search warrants or writs for possession, the officer is entitled to enter forcibly.

§ 527. **Condemnation proceedings.**—Similar to entry under legal process is the entry for purposes of condemnation. Where the statute provides that an owner's land may be taken for certain public pur-

poses, upon compensation being made, the procedure must be strictly followed, and any violation or excess may be deemed a trespass. Such statutes usually provide for a preliminary survey of the ground by the parties contemplating the condemnation proceedings, and for the purpose of making such surveys, an entry may be made without incurring the liability for trespass.

§ 528. **Effect of exceeding the license.**—The nature and extent of the license being ascertained, the licensee is bound to confine himself within its limits. If he goes beyond he loses all protection and is regarded as a trespasser from the beginning. So, if one who pretends to enter a store upon the implied invitation to look at wares, should use the occasion to steal or injure, or if one enters and steals during a conflagration, his original entry is a trespass.

CHAPTER XL.

COURTS IN GENERAL.

§ 529. **Courts and their jurisdiction.**—A court is a tribunal in which controversies concerning public and private rights and wrongs are adjudicated according to the regular forms of law. Courts are the substitutes which in civilized societies take the place of private war, or the right of each individual to seek the redress of his wrongs in his own way. Courts are the creatures of positive law and their jurisdiction is fixed by the power which creates them. The constitution of the United States and the laws of congress fix the jurisdiction of the United States courts, and the constitutions of the several states and of their respective legislatures fix the jurisdiction of the state courts.

§ 530. **Jurisdiction defined.**—Jurisdiction is the right of a court to hear and adjudicate the rights of the parties in a case. It depends on the character of the controversy as to its subject-matter, or on the character of the parties to the controversy, or upon the place where the subject of the controversy arose. Jurisdiction is original or appellate. A court of original jurisdiction is one in which suits are instituted and prosecuted to judgment. A court of appellate jurisdiction is one in which a cause once tried in a court of original jurisdiction may be tried again on its merits,

or in which the record of the court of original jurisdiction may be examined and reviewed to ascertain if the adjudication of the court below was correct. Again, jurisdiction is exclusive or concurrent. A court is a court of exclusive original jurisdiction where the matter in controversy is such that it can not be heard in any other court. Courts are said to be of concurrent jurisdiction where certain actions may be commenced in one or the other, as the party bringing the suit may elect. In these cases, however, the court which first obtains jurisdiction retains it until the final judgment, to the exclusion of all others.

§ 531. **Federal courts.**—The federal courts consist of the Supreme Court of the United States, the United States Circuit Courts of Appeals, the United States Circuit Courts, the United States District Courts, the Court of Claims, the Court of Private Land Claims, the Territorial Courts, and the Courts of the District of Columbia. The judges of these courts are appointed by the President, by and with the advice and consent of the senate of the United States, and with the exception of the judges of the Court of Private Land Claims and the Territorial Courts, they hold office during good behavior. Judges holding during good behavior, who are seventy years old and have served ten years, may retire from office, their compensation continuing during life. Such judges can only be removed from office when they are impeached by the lower house of congress for misconduct in office, and found guilty by the senate of the United States. No law can be passed which will deprive such judge of his office, nor can

any law be passed which will diminish his compensation during his term.

§ 532. **The senate as a court.**—By the constitution of the United States the senate, in addition to its function as a branch of the legislative department of the government, is charged with the duty of hearing and pronouncing judgment in all cases where a public officer is impeached for misconduct in office by the lower house of congress. When the senate is trying the president of the United States upon impeachment, the chief justice of the United States presides over its deliberations.

§ 533. **Judicial circuits and districts.**—The United States is now divided into nine circuits, corresponding to the number of the judges of the supreme court. Judicial districts are created from time to time by congress as the exigencies of business require. Each state has at least one district and some are subdivided into two or more.

§ 534. **Judicial power of the United States.**—The constitution of the United States declares that the judicial power of the United States shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a

state or the citizens thereof and foreign states, citizens or subjects.

§ 535. **Exclusive jurisdiction of federal courts.**—The jurisdiction vested in the federal courts is exclusive of the courts of the several states, in the following matters:

(1) All crimes and offenses cognizable under the authority of the United States.

(2) All suits for penalties and forfeitures incurred under the laws of the United States.

(3) All civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.

(4) All seizures under the laws of the United States on land or on waters not within admiralty and maritime jurisdiction.

(5) All cases arising under the patent-right or copyright laws of the United States.

(6) All matters and proceedings in bankruptcy.

(7) All controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

§ 536. **Concurrent jurisdiction of federal and state courts.**—Except where the federal courts have exclusive jurisdiction, their jurisdiction is concurrent with that of the state courts. The two systems are of equal dignity, and where jurisdiction is concurrent the court which first acquires the jurisdiction over the parties or subject-matter is entitled to retain it free from interference.

§ 537. **Jurisdiction of the supreme court of the**

United States.—In some cases the supreme court has original jurisdiction, that is to say the suit may be begun in the supreme court. This may be done in all cases affecting ambassadors, other public ministers and consuls, and all cases in which a state is a party. In exercising this original jurisdiction, the supreme court causes issues of fact in common law cases to be determined by a jury.

The more important part of the jurisdiction of the supreme court is its appellate jurisdiction. Before the act of March 3, 1891, organizing the circuit courts of appeals, the appellate jurisdiction of the supreme court was extensive. By that act its jurisdiction was greatly changed, being enlarged in some respects, and in others curtailed. Its appellate jurisdiction at present exists in cases coming to it in the following ways :

(1) Directly from the circuit and district courts. Appeals or writs of error may be taken from these courts directly to the supreme court, in cases where the jurisdiction of the court is in issue; in prize cases ; in cases of conviction of infamous crimes ; in cases involving the construction or application of the federal constitution, or the constitutionality of any federal law or the validity or construction of treaties.

(2) From the circuit courts of appeals. An appeal or writ of error is allowed from the circuit courts of appeals to the supreme court in all cases, where the matter in controversy exceeds $1,000 ; except cases in which jurisdiction depends entirely upon citizenship of the parties, cases arising under patent, revenue, and criminal laws and cases in ad-

miralty. As to the excepted cases the decisions of the circuit court of appeals are final, unless that court certifies the case or any questions therein to the supreme court for its decision. Where questions of importance are involved, the supreme court may of its own motion require any case to be certified to it by the circuit court of appeals.

(3) From the highest court of a state. Final judgments of the highest courts of the states may be reviewed in the supreme court of the United States upon writ of error, when such judgment is adverse to a claim or defense based upon the constitution or laws of the United States. If the decision of the state court is in favor of the claim made, the supreme court of the United States has no jurisdiction to review it.

(4) From the courts of the District of Columbia or the territories. The judgments of the supreme court of the District of Columbia may be reviewed by the supreme court of the United States, where the matter in dispute is over $2,500 in value, and in some cases under that amount, if the federal court deem the question to be one of importance.

The judgments of the supreme courts of the territories may be reviewed by the supreme court of the United States where the federal constitution, statutes or treaties are brought in question; where the validity of any patent or copyright is in question, or where the matter in dispute exceeds $5,000 in value and would have been appealable if the judgment had been by a circuit court of the United States.

(5) From the court of private land claims and the court of claims. Appeals are allowed from the court

of private land claims to the supreme court of the United States, which retries the whole case and may take additional evidence.

Appeals are allowed from the court of claims to the supreme court of the United States upon all judgments. There is a jurisdictional limit of $3,000 in some cases.

§ 538. **Jurisdiction of the circuit courts of appeals.**—The circuit courts of appeals were established by the act of March 3, 1891, there being created one court for each of the nine circuits. Each court is composed of three judges, who may be the justice of the supreme court assigned to that circuit, the circuit judges or the district judges within the circuit.

The circuit court of appeals has only appellate jurisdiction, and this only of cases coming from the circuit and district courts within the circuit, and of cases coming from territorial courts that may be assigned to the circuit. The entire appellate jurisdiction is divided between the supreme court and the circuit court of appeals, and the jurisdiction of the latter embraces all the appealable cases except those cognizable by the supreme court directly. There is no jurisdictional limit on account of the amount involved. The cases in which the judgment of the circuit court of appeals is final has been shown above.

§ 539. **Jurisdiction of the circuit courts.**—Formerly the circuit courts had both original and appellate jurisdiction. The latter was, however, wholly taken away by the circuit court of appeals act. The original jurisdiction, as given by the various statutes of the United States, is as follows:

The circuit courts of the United States have origi-

nal cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the value of $2,000, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the value of $2,000, or a controversy between citizens of the same state claiming lands under grants of different states, or in a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds $2,000 in value. They have jurisdiction exclusive of the state courts, of crimes and offenses cognizable under the authority of the United States. As to many criminal cases the jurisdiction is concurrent with the district courts.

The right to sue in the United States court is by various provisions limited to the place of residence of the plaintiff or defendant, and by certain provisions relative to the assignment of claims.

Under various statutes the circuit court has jurisdiction of equitable suits to prevent violations of the law as to trusts, actions civil and criminal under the contract labor act, actions under the interstate commerce law, proceedings to condemn land for national uses, and proceedings to prevent the unlawful occupancy of public lands. Irrespective of the amount involved, the circuit courts have jurisdiction of suits under the patent, copyright and revenue laws.

§ 540. **Jurisdiction of district courts.**—The district courts have jurisdiction as follows:

(1) Of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in certain cases of frauds upon the California surveyor-general's office.

(2) Of all cases arising under any act for the punishment of piracy, when no circuit court is held in the district of such court.

(3) Of all suits for penalties and forfeitures incurred under any law of the United States.

(4) Of all suits at common law brought by the United States, or by any officer thereof authorized by law to sue.

(5) Of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title or interest.

(6) Of suits for the recovery of certain forfeitures or damages due to the United States.

(7) Of causes of actions arising under the postal laws of the United States.

(8) Of civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction.

(9) Of prizes brought into the United States.

(10) Of suits by the assignee of any debenture for

drawback of duties, issued under any law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof to recover the amount of such debenture.

(11) Of suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy relative to civil rights.

(12) Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any law, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof.

(13) Of all suits to recover possession of any office, except that of elector of president or vice-president, representative or delegate in congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color or previous condition of servitude; provided, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the constitution of the United States and secured by any law to enforce the rights of citizens of the United States to vote in all of the states.

(14) Of all proceedings by the writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of congress, or of a state legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the constitution of the United States.

(15) Of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held. [Repealed July 12, 1882.]

(16) Of all suits brought by any alien, for a tort only in violation of the law of nations, or of a treaty of the United States.

(17) Of certain suits against consuls or vice-consuls.

(18) The district courts are constituted courts of bankruptcy, and have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy.

The district court has also concurrent jurisdiction of some matters cognizable in the court of claims.

§ 541. **Jurisdiction of the court of claims.**—This court was established for the purpose of regularly investigating claims against the government, and thereby relieving and protecting congress. It is composed of five judges, who sit at Washington.

The court is required to hear and determine, (1) all claims founded upon the constitution of the United States, or any law of congress except for pensions, or upon any regulation of an executive department; (2) all claims upon any contract, express or implied, with the government, or for damages in cases not

sounding in tort, in respect of which claims the party would be entitled to redress if the United States were suable, except war claims; (3) all counter demands of the government against any such claimant; (4) petition for adjustment of accounts by debtors of the United States; (5) certain questions that may be submitted by heads of departments, to obtain a precedent for their guidance. It also has jurisdiction in a number of minor matters not of general interest.

§ 542. **Jurisdiction of the court of private land claims.**—This court was established in 1891 for the settlement of private titles to lands claimed under Spanish or Mexican grants. It is composed of five judges and sits in the western states and territories in which the lands lie. By the act establishing it the court ceases to exist Dec. 31, 1895. The details of its jurisdiction are not of general interest.

§ 543. **United States commissioners.**—As auxiliaries to the courts, United States commissioners are appointed by the judges of the circuits, and act as examining magistrates in hearing charges for violation of the laws of the United States, and where a probable case of guilt is made out they admit the accused to bail for his appearance before the court having jurisdiction of the offense, or if the offense is not bailable commit the accused to prison. These commissioners have no jurisdiction to pronounce final judgment in any case.

§ 544. **Courts of the territories and of the District of Columbia.**—These are not strictly a part of the federal judicial system. The provisions of the constitution relative to courts of the United States do not refer to courts of the territories. Upon admission of

a territory to the Union as a state, it is the state courts and not the federal courts that are the successors of the territorial courts. The jurisdiction of these courts is a matter of special interest only in the locality of the courts.

§ 545. **State courts.**—The organization and jurisdiction of the state courts are matters within the exclusive province of the legislatures of the several states, and it would be out of place here to attempt to consider the subject in detail. There are, however, some general features of the American state courts which are common to nearly all of them, and which should be noticed in outline at least. Some of these courts are of limited and inferior jurisdiction, and some are courts of general and superior jurisdiction.

§ 546. **Jurisdiction of state courts.**—Courts held by justices of the peace, mayors and police judges are courts of inferior and limited jurisdiction. In some civil matters involving small interests, in petty misdemeanors, the judgments of these courts are final, but where the matters involved are more important appeals lie from their judgments. These courts also have power to issue warrants for the arrest of offenders of the higher grades, and after examination to discharge, admit them to bail, or where the crime is not bailable to commit them to jail to abide the finding of the grand jury, or the judgment of the court having final jurisdiction. In some of the states the courts of superior jurisdiction are divided and classified as chancery courts, common law courts (including civil and criminal courts) and probate courts, each having jurisdiction over such subjects as are implied by their names.

§ 547. In most of the states codes have been adopted by which the distinctions in the forms of equity and common law pleadings have been abolished and one form of action is substituted under which all rights legal and equitable may be enforced. In a few of the states the old distinction between proceedings in equity and at law are still maintained. To ascertain the scope and limits of the jurisdiction of these state courts, recourse must be had to the laws creating them.

CHAPTER XLI.

CIVIL PROCEDURE.

We will now consider the order in which civil actions are commenced and prosecuted to final judgment. Owing to the diversity of legislation in the code states and the practice that has grown up in these states under the rulings of the courts, it is manifestly impossible in our limited space to give the order and rules of proceeding and practice in all the states, and we shall content ourselves with some general statements which will apply to most if not all of them.

§ 548. **Civil actions — Courts — Their officers — Juries.**—An action is a proceeding in a court by a plaintiff against a defendant, to establish a right or to obtain a remedy. In every court there must be a judge, whose duty it is to preside and direct the proceedings of the court and to decide such matters of law or fact as may be submitted to him; a clerk, whose duty it is to keep a faithful minute and record of all the proceedings of the court and to perform such other duties as the law and rules of practice may require; a sheriff, who is to maintain order in the court, to obey the orders of the judge and to serve the process of the court. It is the duty of the jury, under the directions of the court as to matters of law, to decide the questions of fact submitted to them, and

to put their decision in the form of a verdict, to which they unanimously agree.

§ 549. **Actions, how commenced — Parties.**—In every action there must be two adversary parties and a real controversy. Courts are not organized for the purpose of deciding abstract questions of law unless it is necessary to establish the substantial rights of the parties to the action. To begin and prosecute a fictitious proceeding in a court is a contempt of court. The plaintiff begins his suit by filing in the proper court a statement in writing showing the facts upon which he bases his claim for redress. This is called a declaration, complaint, petition, or bill.

§ 550. **The process.**—The clerk issues a writ bearing the seal of the court and attested by the clerk, which is delivered to the sheriff for service upon the defendant who is named in the writ. The writ or summons requires the defendant to appear and plead to the action by a day specified, and must be served as required by law, either by reading it to the defendant in person, by leaving a copy of it at his usual place of residence, or by leaving a copy at some other place designated by law. Sometimes the form of the action is such that the writ issued requires the sheriff to seize the person of the defendant or goods in his possession. And in cases of foreign attachment the goods of a defendant may be seized in a state where he is not a resident to satisfy plaintiff's claim. In actions where the defendant can not be served with process, and the court has jurisdiction of the subject-matter of the controversy, constructive notice is given by publication in a newspaper, or service of summons may be made upon defendant in

another state, when the statute allows it. But in cases where constructive notice alone is given, the judgment of the court is binding upon the defendant only so far as it relates to the property within the jurisdiction of the court.

§ 551. **How served and returned.**—If the sheriff finds the defendant, it is his duty to serve the process, to indorse upon it the time and manner of service, and to return and file it with the clerk who issued it. The defendant may not wish to contest the action, in which case he fails to appear in court, and judgment is taken against him by default. If he wishes to defend he must enter his appearance and file his defense according to the rules of practice of the court where the action is pending.

§ 552. **Matters of defense.**—If a defendant denies the right of the court to hear the controversy, he objects to the jurisdiction. If the court has jurisdiction and the suit is properly brought, the defendant may be willing to admit that the facts stated in plaintiff's complaint are true, but may insist that they are not sufficient in law to entitle the plaintiff to the redress he seeks; in such case he files a pleading called a demurrer, and if the court sustains the position of the defendant, judgment is given against the plaintiff, who has the option to amend his faulty pleading, or to appeal from the judgment. In the same way a demurrer may be interposed to a defective answer or reply, if it does not in the opinion of plaintiff state facts sufficient to constitute a good defense or reply. A demurrer raises what is called an issue of law. A pleading which denies the allegations of another pleading raises an issue of fact. An answer which

admits the sufficiency of the complaint, but alleges new matter which makes a good defense to plaintiff's claim, is called an answer in confession and avoidance.

§ 553. **Objection to jurisdiction, how and when made.**—A defendant who wishes to object to the jurisdiction of the court over the parties to the suit must enter a special appearance for that purpose. If he enters his appearance generally, he waives his right to make such a plea. But if the court has no jurisdiction over the subject-matter, all proceedings in regard to it are void. If a defendant is sued in one jurisdiction, when he has a right to demand that he should be sued in another, he can give the court jurisdiction by appearing to the action or by failing to plead to the jurisdiction. If one court should proceed to try an action in relation to a matter, the jurisdiction of which by law belongs exclusively to another court, all its proceedings would be void. If the facts showing want of jurisdiction appear upon the face of plaintiff's complaint, the court will dismiss the action upon the motion of the defendant. If the facts do not so appear they must be brought to the attention of the court by a special plea to the jurisdiction.

§ 554. **Answers or pleas in abatement.**—A defendant may file an answer in abatement, and this may be based on defects in the process, defects in the service of process, incapacity of plaintiff to sue, incapacity of the defendant to be sued, misdescription of the parties, plaintiff or defendant, misjoinder of parties, non-joinder of parties, another action pending for the same cause between the same parties. Some of these defects may be brought to the atten-

tion of the court by demurrer or motion, according to the practice of the court where the action is pending. It will be seen that none of the defects above named go to the merits of the controversy, and most of them may be cured by amendment. An answer in abatement is a dilatory answer, and ordinarily it must be filed and disposed of before the case is tried on its merits.

§ 555. **Issues of fact and issues of law.**—When the parties are at issue upon a question of law alone, the judge decides it. An issue of fact is submitted to a jury, unless the parties waive a jury and consent to a trial by the court.

§ 556. **The jury.**—A jury is a body usually of twelve men summoned from the residents or citizens of the county where the case is tried who are impaneled and sworn to try the issues in the case and to render a true verdict according to the law and the evidence. What is called the regular venire is a body of men summoned to serve as jurors generally during all or a portion of the term of court. A special venire is a body of men selected and summoned to try a particular case. When a regular or special venire is exhausted by challenges or other cause, without securing the requisite number, a new venire is issued or the number is made up from bystanders who have the requisite qualifications to serve as jurors. Before the jurors are sworn to try the case, either party may object to them as a body or to the jurors individually. The first objection may be based upon an irregularity or defect in the manner of making up or serving the venire, or the misconduct or partiality of the sheriff by whom it is served. The second ob-

jection is based upon the legal disqualification of the jurors objected to, or on account of their bias in favor of one of the parties. The first objection is called a challenge to the array, the second is called a challenge to the polls. There are two kinds of challenges to the polls. Where the ground of a challenge is the bias of the juror it is a challenge for cause. Where the challenge is without cause it is a peremptory challenge. The right to use the peremptory challenge in civil cases is limited to a small number, usually two or three. The right to the challenge for cause is without limit as to number, it being essential that all of the twelve jurors should be able to hear and decide the case without partiality or bias.

§ 557. **Trial.**—The jury being impaneled and sworn to try the case, the counsel of the parties read the pleadings or state the substance of them to the jury, together with a summary of the evidence which they expect to produce in support of the issues.

§ 558. **Evidence.**—Evidence includes all the means by which an alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Proof is the effect of evidence. Evidence consists of statements made by witnesses under oath in relation to matters of fact under inquiry, and of documents produced for the inspection of the jury and court. There are three degrees or kinds of evidence, viz., conclusive, *prima facie*, and evidence tending to prove. Conclusive evidence is such as when produced excludes all evidence to the contrary. *Prima facie* evidence is such as in the absence of evidence to the contrary is sufficient to establish the

existence of a fact. Evidence tending to prove a fact is any competent evidence which tends to establish the existence of a fact in issue. Competent evidence is that which the very nature of the thing to be proved requires, and is the best evidence that the nature of the case admits of. If the question is as to the contents of a written instrument, the instrument itself is the best evidence. If the instrument be lost or destroyed or beyond the jurisdiction of the court, oral testimony as to its contents may be given, and in such case it is competent, being the best that the nature of the case admits of. Sufficient or satisfactory evidence is such as will reasonably satisfy an unprejudiced mind of the existence of a fact. Corroborative evidence is additional evidence of the same character to support the same point as other evidence already given, and it may be a repetition of evidence given as to a fact, or evidence of another fact which makes the existence of the fact already testified to more probable. Cumulative evidence means more of the same kind of evidence and to the same point, and is a species of corroborative evidence. Relevant evidence is such as directly touches upon the issue the parties have made in their pleadings so as to assist in getting at the truth. Evidence is sometimes designated as "admissible," "proper," or "material," but the terms competent and relevant comprehend them all. Direct evidence is such as is given by persons who testify from personal knowledge of the facts. Indirect or circumstantial evidence consists of a fact or group of facts testified to by persons having a personal knowledge

of them, from which the existence of another fact or facts may be inferred.

§ 559. **Functions of court and jury as to evidence.**—Questions as to the competency and relevancy of evidence are decided by the court. The weight of the evidence, or what it proves, is a question for the jury.

§ 560. **Things which need not be proved, or of which courts take judicial notice.**—There is a class of facts which need not be proved, and which are presumed to be known to the judge and jury. They are facts of which courts take judicial notice, as of the existence of nations, of national flags and seals, of the titles of sovereigns or rulers, of public acts, decrees and judgments certified under the seal of foreign nations, of the public laws of the state in which the court is held, of the usages of commercial business, of the genuineness of a notary's seal, of the geographical boundaries of states and nations, of the distances of cities and towns from one another. In short, the court will take judicial notice of what ought to be generally known within the limits of their jurisdiction, and if the memory of the judge is at fault, he may resort to books, maps, or other documents to refresh his memory.

§ 561. **Written and oral evidence.**—Evidence is written or oral. Written evidence consists of all written agreements, instruments, records, public or private, the production and contents of which tend to establish or disprove any material fact in issue. Oral evidence consists of the *viva voce* statements made by witnesses in open court under oath. Oral evidence is allowed where it relates to facts observed

by the witness, or in case of experts to matters of opinion. A deposition is the oral evidence of a witness who can not be produced at the trial, which has been reduced to writing by some competent person, in the presence of the parties. It is in the form of questions and answers. When properly taken upon due notice, and filed in court, it may be read to the jury.

§ 562. **Attendance of witnesses, how procured.**—The attendance of witnesses within the jurisdiction of the court is procured by the issuing and service upon the witness of a writ which is called a subpœna. This requires him to appear in court upon a day named and to remain in attendance until discharged by the court. The subpœna is usually served by the sheriff, by reading it to the witness in person or by leaving a copy for him at his residence. When served the officer returns the subpœna to the clerk with his indorsement thereon showing the time and manner of service. If, in addition to the testimony of the witness, the party calling him wishes him to produce at the trial any document in his possession, there is a clause inserted in the subpœna requiring him to bring with him the document named, giving a particular description of it, so that the witness may know precisely what is wanted. Such a subpœna is called a subpœna *duces tecum*. If a witness refuses to obey a subpœna, an attachment will be issued against him, and in a proper case he will be punished for a contempt of court.

§ 563. **Competency of witnesses.**—Before the enactment of recent statutes on the subject, many persons who are now competent witnesses were held to

be incompetent, on account of their interest in the result of the suit, their relation to the parties and upon other grounds not necessary to be enumerated. By the law of most if not all of the states, these objections which formerly went to the competency of the witness now go to his credibility. There still remains a rule which is almost universal which excludes from the consideration of the court and jury what are called privileged communications. These are communications between priest and penitent, husband and wife, physician and patient, attorney and client. Secrets of state are also privileged, and a witness can not be compelled to testify to any fact which would tend to expose him to prosecution for crime.

§ 564. **Hearsay evidence.**—Hearsay evidence is what a witness says he heard somebody else say, and such evidence is generally excluded. The reasons for the rule are obvious. To allow such evidence would enable the party producing it to get before the jury the statements of persons who were not testifying under the sanction of an oath, and were not subjected to cross-examination. There is the danger also that the witness testifying to the statement may not have heard all of it, or may have remembered it imperfectly. It is a weak sort of evidence at best, and to admit it would be to furnish strong temptations to impose upon the court and jury false and fabricated evidence.

§ 565. **Exceptions to the rule excluding hearsay evidence.**—There are, however, some declarations that in strictness might be called hearsay, which are admissible in evidence.

(1) Where the fact that the declaration was made and not its truth or falsity is the point in question.

(2) Expressions of bodily or mental feelings where the existence of such feelings is the subject of inquiry.

(3) In cases of disputed pedigree, the declarations of the members of the family asserting kinship, entries in the family bible, inscriptions on mural tablets or tombstones are admissible.

(4) Declarations accompanying an act and which tend to show the intent, or any statement made at the time and forming a real part of the transaction.

(5) Dying declarations of the victim of a homicide, made under the apprehension of death, concerning the identity of the slayer and the circumstances of the killing.

(6) Where a statement is made by a witness out of court inconsistent with his testimony in court it can be proved to impeach his veracity.

(7) Where the statement is made by a party to the suit, or by his authorized agent, in relation to the matter in controversy.

§ 566. **Examination of witnesses.**—The order of the examination of witnesses is as follows: First, the direct examination by the counsel of the party calling the witness; second, the cross-examination by the counsel of the opposite party; and, third, the re-direct examination by the counsel of the party calling the witness. As a general rule leading questions, or questions which suggest the desired answer, can not be asked of a party's own witness. A witness who surprises the party who calls him by giving adverse evidence may be asked leading questions on

his direct examination, and the same privilege is allowed to a party who is compelled to call a witness who is hostile to him. On cross-examination leading questions are allowed. A witness may refresh his memory while testifying by referring to a written memorandum, but if he does so the opposite party has a right to inspect the memorandum and cross-examine the witness in relation thereto.

§ 567. **Burden of proof.**—The burden of proof in civil cases rests upon the party making an allegation, and the plaintiff must establish his right to a verdict by producing a preponderance of the evidence. Where the defendant makes an affirmative defense, the burden of proving it rests upon him. This burden is sometimes shifted from one party to the other.

§ 568. **Arguments of counsel and instructions of the court.**—When the evidence is closed counsel address the jury in the order in which the evidence was produced, the party upon whom the burden of proof rests having the right to open and close the argument. After the arguments are made, the judge instructs the jury in the rules of law which are applicable to the facts proved. Counsel have a right to request the court to give specific instructions, and if they state the law and are applicable to the case, it is the duty of the judge to give them. A refusal to give them, or the giving of erroneous instructions, furnish grounds for a new trial to the party injured by them.

§ 569. **Deliberations of jury and verdict.**—After the instructions are given the jury are conducted to a room where they are kept in charge of an officer of the court until they have unanimously agreed upon

a verdict. A verdict may be general or special. A general verdict is expressed in general terms, and finds the issue for the plaintiff or defendant. A special verdict is where the jury, by request of the parties or of their own motion, write out a statement of the facts found by them in detail, leaving it for the court to decide upon the facts so found, whether the judgment should be given for the plaintiff or defendant. When they have so agreed they reduce the verdict to form, cause their foreman to sign it, and then bring it into court, where it is delivered to the clerk, who reads it and asks the jury if it is their verdict. If they assent it is recorded. If either party requests it the jury is polled, which is done by calling each juror separately by name and asking him if the verdict is his. If any juror answers in the negative they are sent back to their room for further deliberation. If the jury say they are unable to agree upon a verdict, and the judge is satisfied that such is the fact, he may discharge them, in which event the case must be tried again.

§ 570. **Motion to set verdict aside and for a new trial.**—The party against whom the verdict is given may move to set it aside and for a new trial. Such motion may be based upon several grounds, as that the jury was guilty of corruption or gross misconduct; that one or more of the jurors had fraudulently procured himself to be impaneled and sworn after he had formed and expressed an opinion as to the merits of the case; that some one in the interest of the prevailing party had tampered with the jury; that the verdict was contrary to law or the evidence or that the court instructed the jury improperly as to the law.

To establish misconduct on the part of the jurors resort must be had to the testimony of witnesses other than jurors, it being a rule that no juror will be heard to testify against the verdict, but he is permitted to testify in support of it. If the motion is overruled judgment will be rendered according to the verdict, and this will stand as a final adjudication of the rights of the parties unless a higher court, for good cause shown, reverses the judgment.

§ 571. **Motion in arrest of judgment.**—Another way of getting rid of an adverse verdict is by a motion in arrest of judgment. This motion is based upon some apparent defect or omission in the record which makes it improper for the court to give judgment on the verdict, as where after verdict for the plaintiff it appears that his complaint does not contain allegations sufficient to constitute a cause of action. When the verdict is set aside on this motion, the plaintiff, if he desires to continue his suit, must amend his complaint, and when the issues are newly made the case will stand for re-trial. When a plea or answer confesses a cause of action and relies upon matter in avoidance which is insufficient, although found to be true by the verdict, to constitute a defense or bar to the action, the court will render judgment for the plaintiff, notwithstanding the verdict.

§ 572. **Forms of judgments.**—Of judgments there are various kinds: (1) Judgment by confession is given against a party who appears in court in person or by attorney and admits the plaintiff's claim. (2) Judgment by default is taken against a party who has been served with a summons to appear to an

action and fails to do so. (3) Judgment upon nonsuit is taken against a plaintiff who, after bringing his suit, fails or refuses to prosecute it. (4) Judgment upon demurrer is where an issue of law raised by demurrer is decided by the court, and the party against whom the decision is made refuses to proceed further, in which case judgment is rendered against him. (5) Judgment upon the verdict is where the court enters upon the record its sentence in accordance with the verdict. (6) An interlocutory judgment is a judgment which decides not the cause, but only settles some intervening matter relating to the cause. (7) A final judgment is a judgment which disposes of the whole merits of the cause and leaves nothing for further consideration of the court.

§ 573. **Appeals and writs of error.**—After final judgment, the defeated party if not content goes to a higher court upon an appeal or writ of error. By the practice in some states an appeal takes the whole case to a higher court, where it is tried again on the merits. In other states an appeal to the higher court is for the purpose of having the record reviewed, to see if the proceedings of the court below have been according to law. A writ of error removes the cause from the court where final judgment was given, and the record is reviewed for the purpose above named. In either case, upon appeal or error, the judgment of the court below is affirmed, reversed or modified, and the cause is then sent to the court where the judgment was entered to be proceeded with or disposed of according to the decision of the higher court.

§ 574. **Execution.**—When the case is finally adjudicated and all motions and appeals and writs of

error are disposed of, the successful party is entitled to have his execution, which is a process issuing out of the court where judgment is given, directed to the sheriff and requiring him to satisfy the judgment by seizure and sale of the property of the party against whom the judgment is rendered. The manner in which this process is to be executed depends upon the provisions of the statutes on that subject.

CHAPTER XLII.

EQUITY AND PROCEEDINGS IN EQUITY.

§ 575. **Equity jurisdiction.**—The jurisdiction of a court of equity pertains to those matters in which the rights of the parties can not be properly ascertained and determined by proceedings at law; and it is a settled rule that where there is an adequate remedy at law the parties have no right to seek redress in a court of equity. The object of an action at law is to recover damages and a judgment at law is generally enforced by a seizure of the property of the party against whom the judgment is rendered. A decree in equity requires the party against whom it is made to do or refrain from doing some act, and obedience to it is enforced by attachment, or by the appointment of some person to do the act for him and in his name and on his behalf.

§ 576. Generally it may be said that courts of equity are established to detect latent frauds and concealments which the process of the law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the

case, than can always be obtained by the generality of the rules of common law.

§ 577. **Injunction—Prohibitory and mandatory.**—The aid of a court of equity is sought where it is necessary to prevent the doing of some act which will result in such injury to one's property or rights as can not be adequately compensated in damages, as the destruction of trees, the infringement of copyrights or trade-marks, the creating or continuance of a nuisance, the keeping of ferocious animals, the making of noises at unseasonable hours near one's dwelling, and for other causes. Where a proper case is made the court grants a prohibitory injunction. In a case of emergency the injunction will be temporary and will continue in force until the hearing, when if the complainant makes out his case the injunction will be made perpetual. Where it appears that it is necessary that some act be done to prevent or suppress a wrong, what is known as a mandatory injunction will be granted, as where one has created and maintains a nuisance he will be ordered to remove or abate it.

§ 578. **General scope of equity jurisdiction.**—The scope of equity jurisdiction is extensive, as will be seen from the following partial enumeration of cases for its exercise. If the execution of a contract has been procured by fraud, equity will cancel it. If by mistake or fraud a contract has been so framed as not to express the intention of the parties, equity will correct the mistake, reform and enforce the contract according to their real intention. A contract to execute a conveyance of land will be specifically enforced in equity when it appears that the party

demanding its enforcement is not himself in default. In such cases, where the decree directs a conveyance and the party refuses to obey the decree the court may enforce it by attachment, or by appointing some person to make the conveyance. The appointment of receivers to manage, control and dispose of property, the adjustment of accounts between partners and between other persons when by reason of the number and nature of the claims they are too complicated to be settled at law; the setting aside of conveyances made to defraud creditors; to regulate trusts and control the trustee in his dealings with the trust estate; the guardianship and control of infants and their property; applications for relief against forfeitures; to compel the delivery of title deeds; to cancel notes or other forms of contract which are not valid or have been discharged; to determine who of several claimants is entitled to a fund in court or in the hands of a third party who is in doubt as to who may be the rightful claimant; proceedings to foreclose mortgages, or to redeem property from sales at foreclosure; these are all matters which are properly cognizable in courts of equity.

§ 579. **A court of equity having obtained jurisdiction will administer full relief.**—Where a court of equity obtains jurisdiction of the subject-matter of controversy, it will retain it until all the rights of the parties litigant are finally determined. And where, in the course of the proceedings, it becomes necessary to pass upon the legal as well as the equitable rights of the parties, the court will proceed to a final adjudication of them all, disposing of legal matters according to the principles of law, and disposing of

questions of equity according to the settled rules of equity.

§ 580. **Suit in equity—How commenced—Pleadings.**—A suit in equity is commenced by filing a bill in which the plaintiff sets forth in detail, without repetition, the facts upon which he bases his claim for equitable relief. Upon the filing of the bill a subpœna, or summons, is issued, which is served as in actions at law. If the defendant does not appear, he is defaulted and a decree is taken against him by default. He usually appears by a solicitor when he desires to make a defense, and upon a day named, called a rule day, he is required to plead, answer or demur to the bill. A demurrer to a bill is based upon some alleged defect in its form or substance. If the demurrer is sustained the plaintiff can amend his bill; if it is overruled the defendant can plead to the bill or file an answer thereto. A plea to a bill is based upon some special matter of defense to the whole bill or a part of it, and if it is sustained the plaintiff may amend, if he can do so. If he can not amend so as to avoid the force of the plea, it will bar his recovery upon so much of the bill as is covered by the plea. If the plea is overruled the respondent must answer or a decree will go against him. An answer in equity, like an answer in an action at law, may be in the form of a denial of the allegations of the bill, or a confession of the substance of them and the setting up of new matter which constitutes a defense thereto. If the defendant is not content with defeating the plaintiff, but claims that he has a right to some affirmative relief, he files what is known as a cross bill, in which the facts upon which he bases

his claim for relief are set out as fully as is required in the original bill, and to this cross bill there may be filed a demurrer, plea or answer. Following the answer is the general replication which puts the case at issue. Before filing a replication, an answer which is insufficient may be excepted to, and if the exceptions are sustained a further answer will be required.

§ 581. **Evidence on hearing.**—The case being at issue the parties proceed to the taking of the evidence which is in the form of depositions made before an examiner, commissioner or some other officer authorized by law. Sometimes to expedite the hearing of a cause the witnesses are allowed to appear in court and testify as in actions at law. Equity cases are ordinarily heard and decided by the judge without the intervention of a jury. Where the case seems to require it the court may frame an issue of fact to be tried by a jury, but this is an interlocutory proceeding to aid the court in making the final decree. The rules as to the competency of witnesses and the relevancy and admissibility of evidence are the same as in actions at law. The decree of the court is final as to the subject-matter and the parties before the court, and if a party is aggrieved thereby he has his remedy by appeal to a higher court, or by filing another bill in the same court in the nature of a bill of review, which is based upon alleged errors on the face of the record or the discovery of new and material evidence.

CHAPTER XLIII.

ADMIRALTY LAW AND PROCEDURE.

§ 582. **Origin and history.**—Admiralty law and procedure, as they formerly prevailed in England, were under the superintendency of the courts of common law, which had power to keep the courts of admiralty within their jurisdiction, and to restrain and prohibit any excess of power. The proceedings of the admiralty courts were according to the method of the civil law, and were formerly held before the lord high admiral of England and such tribunal was not a court of record. By parliamentary enactments the jurisdiction of these courts has been enlarged and their dignity elevated. They had civil and criminal jurisdiction. In them persons were tried for crimes committed on the high seas or on the coasts of England or its colonies, but as they proceeded without a jury, and the accused was liable to be tried and condemned upon the opinion of a single judge, parliament enacted, in the reign of Henry VIII, that these offenses should be tried by the admiralty court with the aid of three or four of the common law judges. An indictment was necessary, and the right to trial by jury according to the law of the land was secured to the prisoner.

The system as it prevailed in our colonies gave the vice-admirals a much larger jurisdiction than the

courts of admiralty in the mother country exercised at that time.

§ 583. **Admiralty jurisdiction.**—Article 3, section 3, of the constitution of the United States, confers admiralty jurisdiction upon the courts of the United States. These courts have declared as the settled doctrine under the constitutional grant of jurisdiction that it means the jurisdiction which had been and was exercised in admiralty in this country prior to and at the time the constitution was adopted, and not admiralty jurisdiction as it was understood in England or Continental Europe. This interpretation, first announced by Judge Story on the circuit, was combatted by other federal judges, but it is now settled law that the jurisdiction embraces the water-borne commerce of the United States conducted on its internal navigable waters as well as on the high seas, and has grown to include all maritime services and contracts, and all injuries when inflicted upon such waters. For a time it was attempted to restrict the jurisdiction to such navigable waters only as were affected by the ebb and flow of the tide, but the supreme court has established the doctrine that the constitutional grant extends the jurisdiction not only to such waters, but over all the navigable waters, canals and rivers of the nation and wherever ships float and navigation successfully aids commerce, whether internal or external.

Admiralty jurisdiction as to torts is confined to wrongs committed on the water. It extends to matters happening during voyages between two ports in the same state and to matters happening in foreign waters. Jurisdiction does not depend on citizenship of the

parties, and where foreigners appeal to our admiralty courts, their controversies will be adjudicated. All ships are *prima facie* subject to admiralty jurisdiction, but there are exceptions as to foreign vessels of war belonging to friendly nations, and vessels engaged in the service of a city government. Generally stated, the subjects of maritime jurisdiction are maritime contracts, touching rights and duties appertaining to commerce and navigation, and also all torts or injuries of a civil nature committed on navigable waters. As to torts the test of jurisdiction is locality, as to contracts it depends on the subject-matter. Contracts for building vessels and for labor and materials in their construction are not maritime contracts. As to torts, they must be torts for which the vessel is liable, and an assault by one passenger on another is not a subject of admiralty jurisdiction. It is otherwise where the wrong is committed by the officers or crew of the vessel. All prize cases and controversies about the distribution of prize money are for the admiralty courts. The jurisdiction of the United States courts in admiralty cases is exclusive, and it is lodged in the district courts. If the district court is improperly proceeding with a cause under claim of admiralty jurisdiction, the supreme court may issue its writ of prohibition to restrain it from going further.

§ 584. **Admiralty procedure.**—The forms of procedure in admiralty are prescribed by rules formulated by the supreme court of the United States. The pleadings are simple and the rules as to allowing amendments are very liberal. Whenever a vessel or cargo is seized it is common practice to release it if the

owner, who is called the claimant, makes a stipulation with security, that he will pay the demand of the plaintiff or libellant, as he is called, if there is an adjudication in his favor. The libel, which is the first pleading filed, must show a case for admiralty jurisdiction, and if it is filed for the benefit of all who are interested in like claims against the vessel it must so state. One peculiarity about the practice is that recoupment is allowed in cases of tort and contract, even when it goes to the extent of compelling contributions among joint tort feasors. In case of collision the damages may be apportioned according to the degree of negligence where both vessels are to blame. In taking evidence, the rules are very lax and this results from the nature of the case, the witnesses being seafaring men, and their places of residence and movements being often sudden and uncertain. Unless the statute expressly requires it, there is no jury trial. Where there is a variance between the evidence and pleadings, it will not be fatal unless it is so great as to mislead the court. The decision is against the vessel and all persons over whom the court obtained jurisdiction. Such decrees are good against all the world, so far as the vessel or cargo is concerned, and can not be questioned even in the courts of a country whose vessel has been seized and condemned in a foreign port by a foreign court.

CHAPTER XLIV.

EXTRAORDINARY REMEDIES AND SPECIAL PROCEEDINGS.

Apart from the ordinary forms of action there is a class of remedies which are properly designated as extraordinary remedies, such as mandamus, *quo warranto*, prohibition, *habeas corpus*, contempt.

§ 585. **Mandamus.**—The writ of mandamus is a command issuing from a court of competent jurisdiction in the name of the state directed to some corporation or officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law. The writ is either alternative or peremptory. In the first instance it is usual to issue it in the alternative form, which requires the person to whom it is directed to appear and show cause why the peremptory writ should not issue. If he shows good cause, the proceedings are at an end. If he fails to show good cause, the court awards the peremptory writ which is its final judgment in the case, and obedience to it can be enforced by attachment. From judgments awarding the peremptory writ there is usually an appeal allowed except in some special cases, as where it issues from the courts of last resort.

§ 586. **Nature of the action.**—The proceeding is instituted in the name of the state on the relation of

some individual who has an interest in the matter, and who is known as the relator. The writ is issued only in cases where there is a clear legal right and the party has no other adequate remedy. Its office is to compel the performance of a ministerial act, but not to control the exercise of a discretion. It will issue to compel a judge to decide a case, but it will not direct him how to decide it. By the French code a judge who refuses to decide a case may be sued for a denial of justice. Though generally used to enforce the performance of public duties, it may be resorted to to enforce private rights when withheld by officers. The following are some of the cases in which this writ may be invoked: (1) To compel the board of commissioners to build or repair bridges; (2) to compel a judge to sign a bill of exceptions or to make a record; (3) to compel a justice of the peace to render judgment or send papers to a higher court; (4) to compel the mayor and city council to levy a tax, or make estimates for public improvements in favor of contractors.

§ 587. **Quo warranto.**—*Quo warranto* is the name of a writ which at common law might be issued against persons or corporations claiming to exercise any office or franchise, for the purpose of inquiring into their authority, and ousting them from such office or franchise in case no authority should be shown. By the common practice in many, if not all, the states, the redress is sought by means of an information in the nature of a *quo warranto*. The cases in which the remedy is applied are (1) where any person shall usurp any public office, or any office in a private corporation; (2) where any officer has

done or suffered an act which works a forfeiture of the office; (3) where an association of persons shall assume to act as a corporation contrary to law; (4) where for non-user or misuser a corporation has forfeited its corporate rights.

§ 588. **How obtained.**—The information is based upon the affidavit of some person, who states specifically the acts or omissions which show a case justifying the proceedings. When the information is filed and the proper notice is served, the defendant appears and the case is conducted, as to pleading and trial, as ordinary civil cases, except where the statute makes provision for a different method of proceeding.

§ 589. **Prohibition.**—Prohibition is an extraordinary writ issuing out of a court of superior jurisdiction directed to an inferior court commanding it to cease entertaining jurisdiction in a cause or proceeding over which it has no control, or where such inferior tribunal assumes to entertain a cause over which it has jurisdiction, but goes beyond its legitimate powers and transgresses the bounds prescribed to it by law. It is a writ which should only be issued in cases of extreme necessity and not for a grievance which may be redressed by means of the ordinary forms of law or in equity. The application for the writ is addressed to the sound discretion of the court and will be issued only where the wrong is imminent and the right to the remedy is clear. Ordinarily, no appeal lies from the judgment of the court refusing to grant the writ.

§ 590. **Habeas corpus.**—The writ of *habeas corpus* is issued by any court of competent jurisdiction or judge thereof, in behalf of any person who is re-

strained of his liberty under any pretext whatever, and it is directed to the officer or person who has custody of the petitioner, commanding him to produce the body of the person so restrained forthwith before the judge or court by whose order the writ was issued, with the day and cause of his caption and detention. It is a writ of right, and the constitution of the United States provides that the privilege of the writ shall not be suspended, unless when in cases of rebellion or invasion the public safety requires it.

§ 591. **What application must show—Return.**—One who applies for the writ must show in his application by whom the person is restrained, the cause or pretense of the restraint, and in what the illegality of the restraint consists. Where the writ is served upon the person to whom it is directed, he must make an immediate return, and if he delays or refuses he may be attached for contempt. Where he produces the person held in custody, he must make and file a return, making a full statement of the authority for the detention and exhibit a copy of the warrant under which he restrains the person in his custody. If the applicant deems the return insufficient, he files exceptions thereto and the judge proceeds to dispose of the application in a summary manner. After hearing the case the judge remands the applicant to the officer or person having him in custody, if the restraint is lawful; if it is unlawful he discharges the applicant from custody.

§ 592. **When legality of restraint will not be inquired into.**—The court or judge will never inquire into the legality of the restraint where it is in pur-

suance of the process of a United States court having jurisdiction, or of a judgment of a court of competent jurisdiction, or when it is for a judgment in contempt proceedings by a court of competent jurisdiction, or when it is upon a warrant of arrest of a court of superior jurisdiction having cognizance of the crime or offense charged against the person restrained.

§ 593. **Contempt.**—Contempt is disorderly, contemptuous or insolent language or behavior in the presence of a legislative or judicial body tending to disturb its proceedings or to impair the respect due to its authority; or a disobedience to the rules or orders of such a body which interferes with the due administration of the law; or speaking or writing contemptuously of the court or judges acting in a judicial capacity; or by printing false accounts and disrespectful comments upon the court concerning causes then on trial. The power to punish for contempt is inherent in courts, though in many states laws have been enacted which define and limit the power, and in some cases provide for appeals. The power of legislative bodies to punish for contempt does not reside in inferior legislative bodies, such as town councils. Contempt of court may be committed by inferior judges or magistrates, who refuse to obey the lawful orders of the superior courts; by sheriffs or other officers of the court in oppression or neglect of duty; by attorneys in breach of decorum or acts of gross injustice; by jurors in misconduct after they are impaneled and sworn; by persons summoned as witnesses refusing to obey the summons; by editors and publishers who, pending a cause, print state-

ments concerning the court, jury or parties, calculated to influence the decision; by persons who knowingly interfere with property in the custody of the officers of the court.

§ 594. **Direct and indirect or constructive contempt.**—Where the act constituting the contempt is in the presence of the court it is a direct contempt, and the court proceeds at once to punish the offender without hearing testimony. Where the act is not in the presence of the court it is an indirect or constructive contempt, and in such cases it is usual to issue a summons to the party to appear in court in person and show cause why he should not be punished for contempt. The accused will be allowed to file an affidavit or to state facts orally on oath showing that he did not mean any disrespect to the court; or he may be compelled to answer questions put to him under the direction of the court, and if it appears upon the hearing that the accused acted in good faith and without any intention to be disrespectful to the court he will usually be discharged. When adjudged guilty the court may fine or imprison the offender.

§ 595. **Attachment.**—Attachment is a proceeding in aid of an action at law by which, at or after the commencement of the action, the plaintiff causes the seizure of the defendant's property to secure the satisfaction of any judgment he may recover in the action. To procure this seizure the plaintiff must make an affidavit showing that the defendant is indebted to him in a sum named; that he has sold or is about to sell and dispose of his property subject to execution, with the intent to delay or defraud his creditors; or that he is not a resident of the state

where the suit is pending. These are the usual causes which are alleged as a basis for the proceedings. What should be alleged, however, in the affidavit, as well as the other steps in the proceedings, are matters of statutory regulation. Before the writ of attachment is issued the plaintiff must execute an undertaking to the defendant for the payment of all costs and damages if the proceedings are wrongful and oppressive.

§ 596. **How writ served.**—When the writ is issued and comes to the hands of the sheriff, it is his duty to execute it at once by the seizure of the property of the defendant sufficient in quantity to satisfy the plaintiff's demand. If through his neglect the plaintiff's claim is lost, he will be responsible for the damages, and he and his sureties may be sued therefor on his official bond. If he seizes property the defendant may reclaim it by giving a bond for its redelivery in case there is a judgment against him, or that he will pay any judgment that may be awarded against him in the action. If the sheriff is in doubt as to the ownership of property which is claimed by persons other than the defendant, he may, before seizing it, demand that the plaintiff make and deliver to him a bond to indemnify him against any judgment which may be rendered against him, in case it should turn out that the property seized did not belong to the defendant.

§ 597. **Garnishment.**—If, at the time of commencing his action or afterwards, the plaintiff will make an affidavit setting forth the causes for attachment, and the additional fact that certain persons are in-

debted to the defendant, a writ of garnishment will be issued and served upon the persons named, after service of which it is their duty to appear in court and make answer, and if it appears that they owe the defendant money which should be applied to plaintiff's claim, the court will order it to be paid into court to satisfy plaintiff's judgment, if he shall recover judgment.

§ 598. **Capias.**—Another proceeding in aid of an action is what is popularly called a capias. The use of the capias is very much restricted in the United States, and is now confined to cases of fraud or probable injury to the plaintiff by reason of the removal of the defendant to avoid service of process; and to cases where, after judgment, the defendant fraudulently conceals money or property which should be applied to its satisfaction. The writ when issued requires the officer to take and keep the defendant until he is discharged by order of court, or until he procures his release by executing such bond as the statute may require.

§ 599. **Arbitration.**—Arbitration is a method of adjusting conflicting claims by the parties outside of court by referring the matters in dispute to others. It is usual where there are two parties for each one to select a person to represent him. The persons so selected are called arbitrators, and if they can not agree the matter is left to a third person chosen by the arbitrators called the umpire, whose decision is final, and the decision, whether made by the arbitrators or the umpire, is called the award. There are two kinds of arbitration, arbitration according to statute and common law arbitration. A stat-

utory arbitration is where the parties pursue the method prescribed by law and enter into bonds for the performance of the award. Where such an award is made and the party against whom it is given fails or refuses to perform it, the matter is presented to court, where the award is confirmed and judgment rendered accordingly, unless the award is impeached for the misconduct of the arbitrators or corruption. A common law arbitration is where the parties agree either verbally or in writing to submit a matter to arbitration without following the forms prescribed by law. Awards made in such cases may be made the basis of an action at law to enforce its terms.

§ 600. **Accord and satisfaction.**—Accord is a satisfaction agreed upon between the party injured and the wrong-doer. The law encourages all efforts made by parties to settle controversies out of court, and when they make such settlements they are binding and will be enforced. To make an accord good the satisfaction agreed upon must be performed. A mere tender of performance if not accepted is not a good satisfaction.

§ 601. **Partition.**—Partition is a division of real property amongst several persons who own it together. Partition may be made by agreement of the parties, and if they can not agree either of the parties can institute legal proceedings, in which the division will be made as the court may adjudge. Partition by agreement is a very simple matter, the parties executing mutual releases or conveyances to one another. They may also submit the matter to arbitration instead of resorting to legal proceedings, and in such case the award of the arbitrators or the umpire

will fix the rights of the parties. Where judicial proceedings are resorted to, the party instituting the action files his petition in the proper court, setting out by specific description the property sought to be divided, giving the names of all the parties in interest with a statement of the nature and extent of their respective interests. A notice or summons is issued and served upon all the defendants, and if any are not residents of the state a notice by publication is given in the manner prescribed by statute. Infants appear and defend either by their legal guardian or by guardian *ad litem*, as the statutes of the several states require. When the issues are made up and the evidence is heard, the court makes an interlocutory decree of partition fixing the shares of the parties, and adjudicating all rights and equities which may arise in the case. Where one of the parties has expended money for the preservation of the property, or where it is shown that one of the parties has received money or property from the ancestor by way of advancement of part of his portion which is to be charged against his interest, in all such cases the court will determine the rights and equities of the parties and incorporate its decision in the interlocutory decree. This decree adjudges that the division be made by commissioners, naming them, and requires the commissioners to report their doings to the court. When this report comes in and it shows that a division has been made, any party in interest has the right to except to the report. If after hearing the report the court determines that the division is unfair, a second order or decree is made requiring the commissioners to make a new division. When the report is

confirmed the court makes a final decree which establishes the rights of the parties to their shares in severalty. If it appears that the property can not be divided without injury to the parties, the court orders it to be sold, appointing a commissioner for that purpose. Where it is sold and the sale is reported and the report confirmed, the final decree is made dividing the proceeds of the sale amongst the parties according to their respective interests and directing the commissioners to make a proper deed to the purchaser.

§ 602. **Certiorari.**—The writ of *certiorari* is a writ which issues from a superior or appellate court to an inferior court or officer exercising judicial functions, or other person, requiring such court or officer to certify to such superior court a full and complete transcript of the records and proceedings of any such inferior tribunal or officer, or to produce any paper whenever it shall be necessary for the proper determination of any cause or proceedings before such superior or appellate court. It differs from a writ of error in the fact that it issues from the higher court to the lower court, whether of record or not, and at any stage of the proceedings, as well before as after judgment. It also issues from an appellate court to an inferior court, requiring it to correct or amend the transcript of its proceedings, whenever it is made to appear to the appellate court that there has been a mistake or omission as to any material particular in the transcript as first certified.

CHAPTER XLV.

CRIMINAL LAW.

§ 603. **Crimes in the United States.**—A crime is an act committed or omitted in violation of a public law. The right to punish criminals rests upon grounds of policy; in a large sense it is the right of self-defense, and is absolutely necessary for the preservation of society. Crimes are defined and their punishment regulated by the common law or statute law. There are no common law crimes which are recognized by the federal courts, their criminal jurisdiction being limited to offenses defined by the laws enacted by congress. In most of the states of the Union there are no offenses punishable as crimes except those which are made so by statutory law.

§ 604. **Capacity to commit crime.**—An act can not be criminal unless the actor is a responsible being, capable of knowing that the act is wrong, having power to control his actions. An idiot or a lunatic, or a young child, is incapable of committing crime. Under seven years of age a child is conclusively presumed to be incapable; between the ages of seven and fourteen it is incumbent on the prosecution to prove capacity; persons over the age of fourteen are presumed to be capable. Aside from these natural infirmities of idiotcy, lunacy and infancy, persons whose powers have become enfeebled by disease, drunken-

ness, or any cause, to such an extent that they have lost the control of their wills and are unable to know right from wrong, are not criminally responsible, although they may be liable in a civil action for the wrongs they may inflict upon others.

§ 605. **Criminal statutes, how construed.**—Criminal statutes are construed liberally in favor of the accused. It matters not how immoral an act may be, or how injurious to society, it can not be punished as a crime unless it is prohibited by law.

§ 606. **Infamous crimes.**—Infamous crimes are held by the federal courts to be such as are punished by imprisonment at hard labor. The state statutes declaring what are and what are not infamous crimes are not harmonious.

§ 607. **Crimes classified.**—Crimes are again divided into felonies and misdemeanors, felonies being such offenses as are punishable with death or imprisonment in the state prison, and misdemeanors offenses of a lower grade, for which lighter punishments are prescribed.

§ 608. **Compounding.**—Compounding an offense is where one for a consideration agrees not to prosecute the offender, or to stop a prosecution already begun.

§ 609. **Attempts.**—Attempts to commit crime are sometimes declared to be crimes themselves. A mere naked purpose to commit a crime, however, unaccompanied by an act in furtherance of the purpose, is not punishable as an attempt. The criminal law deals only with overt acts. It sometimes happens that a man with deliberate purpose attempts to commit a crime which for some cause unknown to him he can not commit, as to pick a pocket which is empty,

or to shoot at another with an unloaded gun; in such cases he is generally held criminally responsible.

§ 610. **Aiding, counseling, etc.**—Advising, counseling, encouraging or soliciting another to commit a crime is a punishable offense, but of this more will be said when we come to speak of accessories.

§ 611. **Unlawful intent and overt act must unite.**—In every crime there must be a union of the unlawful intent and the overt act, and both act and intent must be proved. In most cases the intent is inferred from the act itself, or it may be proved by circumstantial evidence. There is much confusion in the decisions of the courts of the various states as to the character of the overt act necessary to constitute the offense. Thrusting the hand into an empty pocket with intent to steal has been declared by some courts to be an attempt to commit larceny, and the contrary is held by other courts. So of shooting at another with a blank cartridge. Bishop says, as we think correctly, after carefully examining the conflicting decisions, "on the whole we may deem the true doctrine to be that where the object is not accomplished, simply because of obstructions in the way, or because of the want of the thing to be operated upon, where the impediment is of a nature to be wholly unknown to the offender, who used appropriate means, the criminal attempt is committed."

§ 612. **Criminal carelessness.**—Where through the wanton and reckless or grossly negligent conduct of one an accident happens which causes death, the act is criminal. As where an engineer in charge of a locomotive neglects his duty, or one on a building

throws missiles from a house into a public street where persons are passing.

§ 613. **Ignorance or mistake of fact.**—Ignorance or mistake of fact will sometimes deprive an unlawful act of its criminal character, as where one takes the property of another supposing it to be his own, or obstructs a highway without knowing it to be a highway, but where a statute makes an act unlawful irrespective of guilty knowledge, ignorance or mistake is no defense.

§ 614. **Ignorance of law.**—Ignorance of law is no excuse for the commission of a crime, even where the statute making the act criminal has been enacted so recently as to make it impossible that the accused should have known of its existence. Such ignorance would go far to mitigate the punishment, and would give good grounds for an appeal to the pardoning power in cases of conviction.

§ 615. **Self-defense.**—Self-defense is a right which exists in all places without regard to positive law. It may be asserted by any human being, where he is in apparently imminent danger of suffering loss of life, limb or great bodily harm. If the conduct of the assailant is such as to produce in the mind of a reasonable person a belief that such harm is intended, the person assailed may defend himself even to the point of killing his assailant, though the danger was not real but only apparent.

§ 616. **Offenses committed by wife.**—An offense committed by the wife in the presence of the husband is *prima facie* done by his coercion, though this presumption may be overcome by evidence showing that she acted upon her own independent volition,

and in such a case she and she alone is criminally responsible.

§ 617. **Where principal liable criminally for offense of agent.**—A principal is not liable for the criminal acts done by his agent unless the agent is acting under orders from the principal. The same rule applies to master and servant. Where an agent or servant is put in charge of a business, such as publishing a newspaper or keeping a saloon, and a criminal libel is published in the paper or liquor is unlawfully sold in the saloon, the owner of the paper or the proprietor of the saloon may be punished criminally for the act of the agent or servant.

§ 618. **Principal and accessories.**—In the commission of crimes there may be principals and accessories. To constitute one a principal he must be actually or constructively present when the crime is committed, as where one does the act, and another stands near by to give assistance or give warning of the approach of the officers, in such case both are principals.

An accessory before the fact is one who is not the chief actor in the commission of a crime, but procures, counsels, or commands another to commit it. An accessory after the fact is one who, knowing that a crime has been committed, receives, relieves, comforts or assists the criminal.

§ 619. **Drunkenness.**—Voluntary drunkenness will not excuse crime. Where, as a result of habitual drunkenness, one becomes permanently diseased to the extent that he has lost his will power and is incapable of knowing right from wrong, he is incapable of committing crime. Some courts have held

that voluntary drunkenness aggravates a crime, but the better opinion is now to the contrary. Drunkenness of the accused at the time of the commission of the offense may be given in evidence to show want of malice, premeditation or intent.

§ 620. **Insanity.**—Insanity, where it is such as to prevent the accused from distinguishing right from wrong, will relieve him of criminal responsibility, and if from all the facts in the case the jury have a reasonable doubt as to the sanity of the accused they should acquit.

§ 621. **Punishment.**—Punishment is inflicted for the public good. The same act may be punishable as a crime and be a wrong to the individual citizen, in which case the punishment of the crime does not prevent the citizen from seeking redress in a civil action for the damage done to him personally. The individual who suffers in such a case may compromise with the offender and waive his right to redress, but this is no bar to a prosecution of the offender by the state.

The object of punishment is to prevent crime, and this is effected by imposing pecuniary fines, by placing the offender under restraint for a given period of time, with the double view of reforming the prisoner and deterring others from committing like offenses, and in cases of murder, high treason and other crimes of a heinous character, capital punishment is inflicted. In many states the jury pass upon the question of the prisoner's guilt, and the court fixes the measure of punishment within the limits prescribed by the statute. In other states the jury have this power. In the federal courts the jury pass only

upon the question of the prisoner's guilt. Sometimes, in addition to the penalties of fine and imprisonment, the offender is disfranchised and is made incompetent to testify as a witness.

§ 622. **Jurisdiction of crimes.**—The jurisdiction to try and punish offenders against state laws is lodged in the courts of the state within whose borders the offenses are committed. Offenses against the laws of the United States are within the exclusive jurisdiction of the federal courts within their respective districts. This is what may be called geographical jurisdiction. Jurisdiction may depend also on the class of crimes the court may take cognizance of. Petty offenses are tried by magistrates without the formality of indictment or information, while graver charges are only cognizable by superior courts, in which the indictment is preferred by the grand jury and the trial is by a petit jury. As to crimes committed on the high seas, the jurisdiction of nations is determined by treaties and the law of nations.

§ 623. **Territorial jurisdiction of crimes.**—Ordinarily, criminal laws have no force beyond the boundaries of the state enacting the law. But cases arise where crimes are committed partly in one state or county and partly in another. If one enters into a conspiracy with others to commit a crime in another state, and the crime is committed, he may be tried and punished in the state where the crime is committed, though before the trial he may never have been personally within the limits of that state. So if one stands near a boundary line and shoots across it, and the shot takes effect upon a person in another state or county he may be tried in the jurisdiction where the shot

took effect. If a fatal blow is given in one state and the victim removes to another before death ensues, he must be tried in the jurisdiction where the blow was given, though some courts hold that jurisdiction rests concurrently in the courts of both localities. Offenses committed on board ships are generally punishable in the country to which ships belong. The federal courts punish offenses committed by citizens of the United States in foreign lands, but whether the courts of the several states have this power is a mixed question. The power is claimed by the courts of Virginia and Wisconsin, and it is denied in New York and Michigan. Crimes committed on private ships in foreign ports are punishable in foreign courts, and piracy may be punished in the courts of any country. If there is a conflict between the municipal law of a country and the law of nations, the latter will prevail.

§ 624. **Jurisdiction over sovereigns, ambassadors, etc.**—A sovereign traveling in a foreign country is not subject to its laws, and this immunity extends to foreign ambassadors, their households, secretaries and domestic servants. If any of these offend against the laws of the country where they may be residing temporarily, the only redress is to send them home and make demand upon the country they represent for reparation. This rule does not apply to consuls who are mere commercial agents. Persons belonging to an army or navy within foreign territory are free from arrest. The rights of subjects of one country traveling or residing in another are generally regulated by treaty stipulations. In the absence of such stipulations the rules as above stated

will prevail. By the statutes of some states, where a theft is committed in one state and the goods are carried to another, the state in which the offense originated has exclusive jurisdiction, while a different rule prevails in other states.

CHAPTER XLVI.

CRIMINAL OFFENSES.

Every state in the Union has its own way of defining crimes and declaring what punishment shall be inflicted upon offenders. We shall not undertake to give a compilation of the various statutory enactments, but shall content ourselves by giving in brief the essential ingredients of such crimes as are recognized and punished in most of the states.

§ 625. **Abortion.**—Abortion is to cause the miscarriage or premature delivery of a woman. The statutes of some of the states require that the child shall have quickened in the womb at the time of the commission of the crime. The laws of other states declare that the offense may be complete at any time after gestation has begun. The consent of the mother is no defense.

§ 626. **Adultery.** — Adultery is voluntary sexual intercourse with another man's wife. The woman must be married; she must be another man's wife, and whoever, married or single, has illicit intercourse with her becomes guilty of adultery. Such are the essentials of adultery at common law. In some states the offender who is married is alone held guilty; in other states, where the intercourse is between a married woman and a single man, the woman alone is guilty.

§ 627. **Abduction and kidnaping.** — Abduction, though not a common law crime, is made a crime by the statutes of most of the states. It is the act of taking away or detaining a woman against her will, or, in the case of minors, against the will of their parents or other person having lawful charge of them. In a more restricted sense it is the unlawful seizure or detention of a female for the purpose of marriage, concubinage or prostitution. Kidnaping is the unlawful seizure of any person with the intent to remove him to another place. It is a false imprisonment aggravated by the intent to carry the person imprisoned to another place. By the common law kidnaping was the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another.

§ 628. **Affray.**—An affray is the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people. There must be some stroke given or offered; mere quarreling and the use of threatening words are not sufficient. If the fighting is in private it is not an affray. Prize fighting as it is now practiced is not an affray, but it is made a misdemeanor by the laws of most of the states of the Union. In Indiana, Kentucky, and some other states, the fighting must be by mutual agreement to constitute an affray; elsewhere it is held that the mere fighting in a public place, with or without mutual consent, constitutes the offense.

§ 629. **Arson.**—Arson, as defined by Coke, is the malicious and voluntary burning of the house of another by night or by day. There must be an actual

burning of some part of the building, though it is not necessary that any part should be wholly consumed. The burning is sufficient to constitute the offense when any part of the building is charred, but a mere scorching or discoloration is not enough. Formerly the crime of arson was limited to the burning of dwelling-houses, but it now has a wider scope, under the legislation of the various states, so that stables, mills, churches, warehouses, school-houses and other structures may be the subjects of arson. The burning must be malicious and willful, and not merely negligent. The intent to injure is an essential ingredient of the crime, but this intent will be generally presumed.

§ 630. **Assault.**—A simple assault as defined by Bishop is an unlawful physical force partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being. It is essential that the force intended to be applied should be put in motion. Mere preparation or threats are not an assault. There must be some act which if not stopped may apparently, or, as some courts hold, actually, produce injury. Striking at another within striking distance though the blow comes short, throwing a missile at another, aiming a gun within gunshot, pointing a pitch-fork at a person within reach, such act coupled with a present intention to do violence would be an assault.

§ 631. **Assault and battery.**—A battery is the unlawful touching of another in a rude, insolent or angry manner. To spit upon one, to set a dog upon him which touches or bites him, to touch or lay hold of the clothes of another, is sufficient. There must

be intentional physical contact. If this is lacking it can amount to no more than a simple assault.

§ 632. **Assault with intent.**—An assault with intent is where an intent to commit a specific crime accompanies the assault, as an assault with intent to kill, to rob, to rape or to inflict some serious bodily injury. In order to convict in such cases the specific intent charged against the accused must be proved, and this intent may be inferred from his acts, words and the circumstances surrounding the transaction. The apparent consent of persons who are legally incapable of giving consent is no defense to a charge of assault with intent. In case of assault with intent to commit a crime, there must be according to the rule established in some courts a present ability in the assailant to inflict the injury, but the better opinion is that it is sufficient, if there is a reasonably apparent present ability, so as to create an apprehension that the injury may be inflicted, and cause the person threatened to resort to measures of self-defense.

§ 633. **Justification for assault.**—No one can be held to be guilty of an unlawful assault who has a sufficient justification or excuse for his act, as where it is in the necessary defense of his person, his property, or the persons to whom he owes the duty of protection, as wife, child or servant. As we have seen, a person who shoots at one, believing him to be another person whom he intends to kill, is guilty of shooting with intent to kill, and shooting or throwing a missile into a crowd is an assault with intent to kill or injure any one who may be in reach of the gun or the missile thrown.

§ 634. **Barratry, champerty and maintenance.**—These offenses were all punishable at common law. Barratry is the offense of frequently stirring up quarrels and suits, either at law or otherwise. The indictment should charge the offender with being a common barrator, and there must be proof of at least three instances of offending. Champerty is a bargain with a party to a suit for a portion of the land or other matters sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense. Contracts by attorneys for purely contingent fees, to be paid out of the damages recovered, were formerly considered champertous and void, but they are looked upon with more indulgence now and the practice of making such contracts is common, though it must be admitted that they have a pernicious influence on the character and standing of attorneys who make them. Where such contracts exist the attorney becomes, in effect, one of the real parties to the action. In some states it is held that the purchase and sale of land in litigation, or in the adverse possession of another, is a champertous contract and will not be enforced. Maintenance is a malicious, or at least officious, interference in a suit in which the offender has no interest, to assist one of the parties to it against the other with money or advice to prosecute or defend the action, or, as it is otherwise defined, it is the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing the litigation.

§ 635. **Bestiality—Sodomy.**—The first is the copulation of man or woman with a beast, the second the unnatural copulation of man with man or man with

woman. Both parties are guilty of sodomy and the consent of the parties is no defense. These crimes are generally spoken of as the abominable and detestable crimes against nature, and as crimes not to be named among Christians.

§ 636. **Bigamy or polygamy.**—One already married and having husband or wife living, who marries a second time, is guilty of bigamy. These are statutory and not common law crimes. If the first marriage has been annulled by a court of competent jurisdiction, the parties are free to contract a second marriage, and if a person whose husband or wife has been absent for a certain number of years without being known by such person to be living, the person whose husband or wife is thus absent may innocently contract a second marriage. Where there has been no valid divorce from the first husband or wife and a second marriage is contracted on the advice of counsel and in the honest belief that the divorce is valid, it is generally no defense, though the supreme court of Indiana has held that where the belief was on reasonable grounds after due inquiry, it is a defense to a criminal prosecution.

§ 637. **Bribery.**—Bribery at common law was limited to the giving to a judge or other officer connected with the administration of justice any undue reward to influence his behavior in office. A better definition is the giving or receiving of a reward to influence any official act, whether of a judicial officer or not. The statutes of the states have extended the scope of the crime until it now includes judges, jurors, election officers, voters, legislators and all

public officials who are placed in responsible stations to perform public service.

§ 638. **Burglary.**—Burglary at common law is the breaking and entering of the dwelling-house of another in the night-time with the intent to commit a felony therein. There must be some breaking, and if the entry is made through an open door or window the offense is not complete. The raising of a closed window or the turning of the knob or lifting the latch of a closed door is sufficient. So if there is an entry through an open door, but a breaking of an inner door, it is sufficient. There must be a breaking of some part of the house; forcing the door of an area wall or breaking open a chest or trunk in the house will not constitute a breaking. If one with intent to commit a felony knocks at a door, and an inmate opens it and he thus gets in, it is a constructive unlawful breaking. So where one gains admittance upon a false pretense of having business with an inmate, or by collusion with the servants of the household. An entry is essential, but the slightest entry is sufficient. If any part of the body or a weapon, a stick or anything in the offender's hands is thrust into the house through a door or window which has been broken, it will constitute an entry. The entry need not be at the same time as the breaking, but both must be in the night. Night for the purposes of this crime begins when daylight ends and when countenances can not be easily discerned, and ends when there is sufficient daylight to discern them. The building broken into must by the common law be a dwelling. The statutes of many states have included stores and many structures not used

as dwellings. In some states a breaking and entering in the day-time with intent to commit a crime is declared to be burglary. The intent to commit a crime must exist. Ordinarily the intent of the burglar is to steal, but it may be to commit any other crime. Whatever the intent is it must exist at the time of the breaking and entering.

§ 639. **Cheating—False pretenses.**—Cheating by false pretenses is where any person by a false and fraudulent representation or statement of an existing or past fact, made with a knowledge of its falsity and with intent to deceive and defraud, induces another to part with money or property of value. It is not larceny because that implies that the owner's goods were taken from him without his consent. No mere expressions of opinion nor promise for future conduct, however fraudulent and false, will amount to a false pretense. The fraudulent representation must be of such a character as would mislead a person of ordinary intelligence. The injured party must be deceived, the representations must be false and must be believed to be true by the party defrauded. The offender must fraudulently intend to obtain the property and to deprive the owner of the use of it, and the offense is not complete until the owner has parted with his property. It is no defense to show that other motives influenced the owner in part. It is sufficient if the fraudulent and false pretense charged were a part of the moving cause without which the owner would not have parted with his property.

§ 640. **Conspiracy.**—A conspiracy is a combination of two or more persons, by some concerted action,

to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. In many states conspiracy is indictable as a common law offense, in others there is no common law jurisdiction of the offense.

§ 641. **The agreement.**—The agreement, which is an essential ingredient of the crime, may be express or implied, and its existence may be proved by circumstantial evidence. Any one who enters a conspiracy adopts all the previous acts of his co-conspirators in forming and carrying out the criminal purpose, and is bound by all that is done by them afterwards unless he withdraws and renounces his connection with it. If the conspiracy is to commit a felony, the conspiracy is merged in the consummated act. The mere unlawful agreement constitutes the crime, whether the unlawful purpose is accomplished or not. All parties to a conspiracy are liable, in a civil suit for damages, to the injured person.

§ 642. **Dueling.**—Dueling is made a crime by the statutes of all the states. If death ensues all the parties, principals and seconds are guilty of murder. The sending or carrying of a challenge to fight a duel is an indictable offense in most of the states.

§ 643. **Embezzlement.**—Embezzlement is not a common law offense, but is made a crime by state statutes. It is like larceny in its effects upon the owner, and in the intent of the offender, but it differs in the important particular that the offender comes lawfully into possession of the money or thing embezzled, the criminal act being the fraudulent and unlawful appropriation of it to his own use. Bailees, cashiers

or tellers of banks, clerks, public officers, agents and officers of corporations, book-keepers, in short all persons entrusted with the care of money or property belonging to others, who unlawfully and with fraudulent intent convert it to their own use, are embezzlers. If it appears that the money or thing taken was in the actual or constructive possession of the owner, the offense would be larceny and not embezzlement.

§ 644. **Extortion.**—Extortion signifies in an enlarged sense any oppression under color of right, but in a stricter and more accurate sense it is the demanding and receiving of money by an officer by color of his office, either where none is due or where the sum demanded and received is in excess of the amount due. It is an offense which can be committed only by officers, whether federal or state, ministerial or judicial. One who acts as an officer can not plead in defense to a charge of extortion that he did not hold the office rightfully. The most common form of the offense is the demanding and receiving fees for official services in excess of the amounts fixed by law.

§ 645. **False imprisonment.**—False imprisonment is the unlawful restraint of a person contrary to his will, either with or without process of law. There must be a forcible detention of the person, and the detention must be unlawful. An officer who arrests and holds one in obedience to a writ directed to him from a court of competent jurisdiction is not guilty of the offense unless there was something on the face of the writ itself showing that it was not properly issued.

§ 646. **Forgery.**—Forgery at common law is the falsely making or materially altering or uttering with intent to defraud, any instrument in writing which if genuine would impose a legal liability. The false making must be with the intent that it shall appear to be the act of another, and with the intent to defraud. One who honestly believes that he has the authority to sign the name of another, or to make a material alteration in a written instrument, is not guilty of forgery though no such authority existed in fact. While the intent to defraud is necessary, it is not essential that the party intended to be defrauded should be injured thereby. It is no defense for the forger to say that his work was done so blunderingly that it would deceive only stupid and careless persons. An alteration of an instrument which though intended to do so does not in fact and law alter the rights or obligations of the parties to it is not a forgery, though the party making it did so with a fraudulent intent. The uttering of the forged instrument is complete when the forger by words or actions declares that the forged instrument is genuine with a knowledge that it is false. By the statutes of most states the possession of forged or counterfeit bank notes with intent to utter or pass them is punishable as forgery.

§ 647. **Fornication.**—Fornication is voluntary illicit sexual intercourse under circumstances not constituting adultery. Single acts of fornication have been made criminal in some states, while in others it is punished only when it is habitual and notorious.

§ 648. **Homicide.**—Homicide is the killing of a

human being, and it may be a lawful and an innocent act or a criminal act. Where it is criminal it is designated as murder or manslaughter. In most of the states there are grades of murder, as murder in the first degree, murder in the second degree.

The highest grade of murder, that is, murder in the first degree, is the unlawful and felonious killing of another human being with malice aforethought. Murder in the second degree is like murder in the first degree, except that it lacks the premeditated design which is essential to the first, it being the intentional unlawful killing with malice, but without premeditation.

§ 649. **Voluntary manslaughter.**—Manslaughter is the unlawful killing of another human being without malice, and is either voluntary or involuntary. Voluntary manslaughter is where the act causing death is committed in the heat of sudden passion caused by provocation. There must be a purpose to kill or to inflict serious bodily harm. It is not necessary that the passion should be such as to dethrone the reason, but it must be sufficient in degree to negative the idea of malice in the slayer. Whether in the particular case the provocation was adequate, or the passion excited sufficient to rebut the idea of malice, is for the jury to determine. The provocation may consist of abusive language, or an unlawful assault. And where two engage in a combat with or without weapons and one is killed, it is voluntary manslaughter, unless the combat was sought by one merely as a pretext for killing the other.

§ 650. **Involuntary manslaughter.**—Involuntary manslaughter is the unlawful killing of a human be-

ing without malice, and without intent to kill or to inflict the injury causing death, committed accidentally in doing an unlawful but not felonious act, or in the improper or negligent doing of a lawful act. The following are instances of involuntary manslaughter when death results:

The reckless handling and discharge of firearms, gross carelessness on the part of a locomotive engineer or the master of a vessel, the grossly negligent use of defective material in building a house, reckless riding of a horse or driving a vehicle, cruel and immoderate punishment of a child or pupil.

§ 651. **Justifiable homicide.**—Homicide is justifiable where life is taken by the proper officer in pursuance of the lawful sentence of a court adjudging the execution of a convict; where the killing is in the necessary self-defense of the person of the slayer, or of a husband or wife, parent or child, master or servant, or a man's habitation; where it is necessary for the preservation of the peace, or to arrest or prevent the escape of a felon, or to prevent the commission of a felony. So also is the slaying of enemies in time of war, or the execution of persons guilty of certain breaches of the rules of military law. In cases of necessity where an alternative exists between two or more lives having equal rights, and it is apparent or extremely probable that one or more must be sacrificed in order to save the others, it is justifiable to take such life or lives. In the case of an overloaded boat, where the sailors threw some passengers overboard to lighten the vessel, the court held that they were guilty of manslaughter, and that

in such an extremity the victims should have been selected by lot.

To justify homicide on the ground of self-defense the accused must show that he was in apparent danger of losing his own life, or of suffering grievous bodily harm at the hands of his assailant. It may turn out that the danger was not real, but if the conduct of the assailant was such as to create in the mind of the person assaulted a reasonable apprehension of danger at the time, it is sufficient. The same rule applies where the plea is urged by one who takes life in the defense of those to whom he owes the duty of protection.

§ 652. **Malice.**—Malice and the intent to kill are essential ingredients of murder, but this malice does not necessarily involve the notion of ill will toward the person slain. Where by one's conduct it is shown that he has a heart regardless of social duty and fatally bent on mischief, malice is sufficiently proved. Proof of a formed purpose to take the life of the victim is sufficient to establish the existence of what is called malice aforethought, and it is enough if the intent to kill exists at the moment of killing, if it is deliberate. The jury may infer malice from the act and manner of killing where it is unlawful, and it is for them to determine from all the circumstances whether malice in fact existed.

§ 653. **Incest.**—Incest is sexual intercourse by persons who are related to each other in degrees within which marriage is prohibited by law. It is a crime unknown to the common law, and the statutes of the different states must be consulted to ascertain what constitutes the offense in any given locality.

§ 654. **Larceny.**—Larceny is the unlawful taking and carrying away of the personal property of another with the intent to deprive the owner thereof. Grand larceny and petit larceny are distinguished arbitrarily by the value of the property taken, as declared by the statutes of the various states. What is grand larceny in one state may be only petit larceny in another.

§ 655. The taking must be secret and fraudulent, and it is not necessary that it should be by the thief in person. If the thief with felonious intent induces an innocent person to take the personal property of another and deliver it to him it is an unlawful taking. The slightest intentional removal of the article from the place where it was before is a carrying away.

§ 656. It is not necessary that the person from whom the property is taken should be its absolute owner. Any rightful possession as that of a bailee having a qualified right of property would be ownership sufficient to support a charge of larceny. Goods in the possession of an agent or servant of another are constructively in the possession of the owner or master, though he may be personally ignorant of their existence or whereabouts. If possession is obtained lawfully the subsequent carrying away with the unlawful intent will not make it larceny. The unlawful intent to carry away and convert the property must exist at the time of taking. If by a fraudulent trick the owner is induced to part with the possession of his property temporarily, the thief intending to appropriate it unlawfully, it is larceny.

§ 657. **Libel.**—Libel is made criminal by the laws

of some states, and it may be defined to be the willful and malicious publication of any false and scandalous matter tending to injure the reputation of another, or to hold him up to public ridicule and contempt. In most states the injured person is left to his remedy at law by means of a civil action for damages.

§ 658. **Malicious trespass or malicious mischief.**—The offense is ordinarily limited to injuries to property, as the maiming of cattle or other beasts, girdling trees, disfiguring houses. Malice is an essential ingredient of the offense; but where the injury is willful, malice will be presumed. It is essential that damage shall have resulted to the property.

§ 659. **Mayhem.**—Mayhem at common law was the act of unlawfully and violently depriving another of the use of some member of his body whereby he was rendered less able to fight. A mere disfiguring, such as cutting off an ear or a nose, was not mayhem at common law. By statutes in England and America, the definition has been extended so as to include all malicious injuries which disable or disfigure the injured person. It must be intentional, and an injury resulting from a random blow or thrust during a fight will not constitute mayhem, although it may result in maiming or disfiguring the injured party. There must be the specific intent to do the act which results in the crippling or disfiguring.

§ 660. **Nuisance.**—Nuisance is a common law offense and consists in the unlawful doing of an act, or permitting a condition of things to exist which is prejudicial to the health, comfort, safety, property,

sense of decency or morals of the citizens at large, and it may be an act unauthorized by law, or from neglect of a duty imposed by law. To carry on an offensive trade in a populous community; to keep a pig sty in a city; to allow a stable in a city to become filthy; to disturb the public rest by useless and unlawful noise; to pollute streams or lakes which supply drinking water to the public; to keep a disorderly house, and other such acts, constitute the offense.

§ 661. **Perjury.**—The crime of perjury as described in the common law is committed where a lawful oath is administered in some judicial proceedings or due course of justice to a person who swears willfully and absolutely and falsely in a matter material to the issue or point in question. By various statutes the offense is extended to false swearing in matters not connected with judicial proceedings. The crime may be committed by a witness on oral examination, in the course of a trial, or by a deposition taken before an officer duly authorized to take it, or by an oath to an affidavit to be used at any stage of the judicial proceedings to which it relates. The form of the oath is immaterial, if it be administered in such a way as to bind the conscience of him who takes it and to accord with his religious belief.

An affirmation taken by one who has conscientious scruples as to the taking of an oath is the same as an oath, and one who falsely affirms is as much a perjurer as if he falsely swears. The false statement must be of a matter material to the subject under consideration. A guilty intent is necessary to per-

jury, but a reckless statement under oath of the existence of a fact of which the person taking the oath had no knowledge is perjury, although the statement sworn to may be true.

§ 662. **Piracy.**—Piracy is robbery on the high seas, being a forcible depredation on the high seas without lawful authority and done in the spirit and intention of universal hostility. Indictments and trials for piracy are within the exclusive jurisdiction of the federal courts, and it is the exclusive province of congress to say what acts constitute piracy.

§ 663. **Rape.**—Rape is the having carnal knowledge of a woman forcibly and against her will. Sexual intercourse with a child under the age of consent fixed by law, with an insane woman, or a woman in a condition in which she can not consciously consent, or when consent is extorted by fear, is rape, though no actual force be used. The crime is not complete unless there is some penetration by the male organ. It is no defense to a charge of rape that the injured woman is a prostitute, though her evidence would be regarded with suspicion. It may be said of the crime, generally, that it is a charge easily made and hard to disprove. If the woman be of good repute and make seasonable outcry, and show signs of injury, and the place where the crime was perpetrated be remote from observation, and if the offender flee to avoid arrest, her testimony is of great weight. A male under the age of fourteen is, in many states, conclusively presumed to be incapable of committing the offense ; in other jurisdictions his ability to commit the crime is matter for proof.

§ 664. **Riot.**—Riot is a tumultuous disturbance of

the peace by three or more persons assembling together on their own authority with an intent, mutually, to assist one another against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act accomplished was of itself lawful or unlawful. The act is not criminal because it is unlawful, but on account of the violent and turbulent manner of doing it. There must be three or more guilty parties, and if three only are charged and two are acquitted, the third can not be held guilty. An agreement to participate in the enterprise may be implied from the circumstances and conduct of the parties.

§ 665. **Robbery.**—Robbery is the taking with felonious intent of any money or goods of any value belonging to another from the person of another, or in his presence against his will by force or violence or by putting him in fear. The robber must take and remove the property taken, the thing taken must be the subject of larceny, the force used must be before or at the time of the taking and of such character as to make it evident that it was intended to overpower the party robbed or to prevent resistance on his part and not merely to get possession of the property. The mere taking the property from another by the false pretense that the taker is an officer, or the quiet and unobserved picking a pocket, or the snatching of an article from another's hands when there is no struggle or resistance, is not robbery. The fear must be such as would intimidate

and create a reasonable apprehension of danger. The person robbed need not be the owner of the property, possession is enough. If the accused acted in good faith, under the impression that the property was his own, there is no robbery.

§ 666. **Seduction.**—Seduction is the enticing by a man of an unmarried woman of previous chaste character, by means of persuasions and promises, to have sexual intercourse with him. Some statutes require the promise to be a promise of marriage. Others make it a crime to debauch and seduce an unmarried female of previous chaste character without regard to the means employed. Where the consent is given merely from carnal lust and the intercourse is from mutual desire, there is no seduction. If the woman knew the man to be married she will not be heard to say that she consented to the intercourse because of a promise of marriage.

§ 667. **Treason and misprision of treason.**—Treason against the United States is where a person owing allegiance levies war against them, or adheres to their enemies, giving them aid and comfort. The different states define treason in substantially the same way. Under the federal constitution no person can be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. If a body of men be actually assembled for the purpose of effecting by force a treasonable design, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered traitors.

It is the duty of a citizen who has knowledge of the commission of treason against the United States to disclose the same to the president or a judge of the United States, or to the governor or some judge or justice of a state, and the failure to make such disclosure is misprision of treason.

CHAPTER XLVII.

CRIMINAL PROCEDURE.

§ 668. **Arrest.**—The criminal law having been violated, the question arises, how shall the offender be brought to punishment? And first, of arrest, which is the taking into custody an alleged offender, in order that he may be tried. The arrest may be made by an officer or any citizen with a warrant, by an officer or citizen without warrant, by any person upon hue and cry.

§ 669. **Warrant for arrest.**—A warrant is a writ directed to a sheriff, constable or officer, or other person named, requiring him to apprehend and bring before the magistrate or court, from which the writ issues, the person named in the writ as the offender. The warrant, when issued by a magistrate, is based upon an oath made by some citizen charging the person named therein with the violation of some criminal law. When issued by a court, it is based upon an indictment found by the grand jury, or upon an information filed by the public prosecutor. It is the duty of the officer, or person charged with the duty of serving the warrant, to make the arrest without delay, and this is done by notifying the alleged offender named in the warrant that he is arrested. It is proper and usual to lay hands on the accused. A mere touching with the finger is

enough, and even this may be waived by the defendant if he submits to arrest. If a question is raised as to the authority of the officer or person making the arrest, it is customary for him to show the warrant, though this is not necessary, if he state the substance of the writ. If the offender knows the person to be an officer, no further notice is required, and so if the officer exhibits his badge of office.

§ 670. **When warrant void and when valid.**—A warrant issued by a magistrate or court which has no jurisdiction of the offense charged gives no authority to the officer or person named to make the arrest. It must appear to be based upon some formal accusation made before a competent magistrate or tribunal, and to charge the person named therein with the commission of a specific offense; and it must bear the seal or signature of the court or magistrate who issued it. Mere clerical or formal errors are immaterial and will not destroy the validity of the writ. If an officer makes an arrest upon a void and illegal writ, he does so at his peril, and if the person apprehended is innocent, the officer may be liable in damages for false imprisonment.

§ 671. **Arrest by officer without warrant.**—An officer is in duty bound to arrest for felony without warrant where there is reasonable ground for suspecting the party to be guilty. If a crime or misdemeanor is committed in his presence, he has no discretion but must arrest the offender. If he is informed by others that a crime has been committed he must act with discretion and prudence and upon

reasonable grounds. It is the safer course always, when time will permit, to delay making arrest upon information without warrant and require those making the complaint or charge to make oath to it before a proper magistrate. The question in all such cases for the officer is, has he good grounds to believe that a crime has been or is about to be committed?

§ 672. **Arrest by private person.**—Private persons who are called upon by a proper officer to assist in making an arrest for felony must obey, and it is an offense against the law to refuse. In cases of felonies, if a private person without warrant has reasonable ground to suspect an other of being the guilty party, he may, if acting without malice and in good faith, make the arrest, and for doing so he is not liable civilly or criminally if the arrested person proves to be innocent. To protect a private person who makes an arrest for felony without warrant, it is necessary that a felony should have been committed, and that the person had good ground to believe that the person arrested was the guilty party. An officer is protected in such case if he have reasonable ground to believe that the party is guilty, whether a felony has been committed or not.

§ 673. **Arrest upon hue and cry.**—If a crime has been committed and an officer or people are in pursuit of a suspected offender, any citizen acting in good faith may apprehend the person pursued and keep him in custody until he has opportunity to deliver him to the officers of the law.

§ 674. **What an officer may do in serving warrant and making arrest.**—An officer with a warrant for

the arrest of a person may pursue him to his home, and if necessary he may break down the doors. A private person without a warrant, who has good reasons for believing that one has committed a felony, may use the same force in making the arrest, though if the party arrested prove to be innocent an action for damages would lie against the persons so breaking open doors without warrant. Mere suspicion of guilt will not justify such a course on the part of a private person. If an offender secretes himself in the house of another, the right to arrest him and to use force is the same as if he were in his own house. Upon proper affidavits magistrates issue search-warrants for stolen goods, and an officer having such a warrant may break open doors, trunks, etc., in prosecuting his search. Before resorting to such violence, however, he should make a demand for peaceful entrance and for the keys of trunks or chests in which the stolen goods are suspected to be.

§ 675. **Extradition.**—Where one who has committed a crime in one state flees to another, his arrest may be accomplished by means of a writ of extradition. This writ is issued by authority of the state where the fugitive may be in hiding, upon a formal application of the governor of the state in which the crime was committed. The extradition of fugitives from justice is in obedience to a requirement of the constitution of the United States, which provides that a person charged in any state with treason, felony, or other crimes, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, and be removed to

the state having jurisdiction. This provision includes every crime punishable in the state making the requisition. The person who takes custody of the fugitive for the purpose of bringing him to the state from which he fled is not necessarily an officer. He is the agent of the state making the demand and is named in the requisition. When he has custody of the fugitive it is his duty to transport him without delay to the state and county where the crime was committed and to deliver him over to the proper officer, to be dealt with according to law.

Fugitives from justice who seek refuge in a foreign country are delivered up according to the stipulations of the treaties made upon that subject. The crimes for which such fugitives will be surrendered to the country claiming them are enumerated in the treaties. No civilized country, however, will deliver up a fugitive who is charged with a political offense.

§ 676. **Examinations, bail, etc.**—The accused being in custody and before the officer or court having jurisdiction of the case, he is entitled to have an examination and trial in due course of law. If the offense is trivial, the magistrate, mayor, justice of the peace, or police judge, proceeds promptly to hear the case and assess the penalty. In such cases the judgment is final unless by statute an appeal to a higher court is allowed. If the offense is of a higher grade and one of which the magistrate who issued the writ has not jurisdiction to try, he proceeds in a summary way to hear the evidence, and if a case of probable guilt is made out, he requires the accused to give bail, if the offense be bailable, for his appearance before the court having final

jurisdiction, to answer the charge; and if bail is not given, the accused is imprisoned until the charge against him is disposed of by that court. If on the preliminary examination the magistrate should decide that the evidence did not establish a case of probable guilt, the accused would be discharged. Such a discharge, not being a final judgment, would be no bar to subsequent arrests and trials for the same offense.

§ 677. **Right to speedy trial—Presence of accused in court.**—Where bail is given, or the accused is imprisoned by the examining magistrate for want of bail, he is entitled to have the charge against him investigated at the next term of the court having jurisdiction. If no indictment is found against him and no formal charge made in that court, he will be discharged. When the indictment is found by the grand jury, or an information is filed by the prosecutor, the defendant is entitled to be arraigned and have the charge read to him in open court. He can waive this right and appear and plead by attorney if he pleases. When a prisoner is in custody, he has a right to be present in court at every stage of the proceedings. If he is on bail and voluntarily absents himself during a part of the proceedings, such absence will not affect the validity of his trial and conviction.

§ 678. **Right of prisoner to have counsel.**—The right of the prisoner to be represented by counsel is guaranteed by the constitution of the United States and by the constitutions of most of the states. If he is not able, or refuses to employ counsel, the court will assign some attorney to appear for the pris-

oner and conduct his defense. An attorney who is so designated by the court is bound to perform the duty assigned him. In some jurisdictions the attorney receives no compensation, in others the court makes him an allowance which is paid out of the public treasury, as other court expenses are paid.

§ 679. **Change of venue.**—The defendant has a right to be tried by an impartial court and an unprejudiced jury. If it is shown to the satisfaction of the court by proper affidavits that the local prejudice in the place where the prisoner is arraigned for trial is so great that it would be impossible to give him a fair trial, the place of trial will be changed to another jurisdiction. In some states the judge has no discretion, but must award the change when applied for in the form required by law. In other states the judge may allow or refuse the application at his discretion. The same rules apply where the prisoner impeaches the partiality of the judge and demands a trial before an unprejudiced judge.

§ 680. **Application for continuance.**—If the prosecutor or defendant is not ready to proceed with the trial on account of the sickness or absence of important witnesses, the court will grant a continuance. A mere statement of the prosecutor that he is not prepared to proceed is usually enough to procure a continuance. A stricter rule is applied to the defendant who in order to procure a continuance must show to the court by affidavits that a material witness or witnesses are absent, that it was impossible by the exercise of reasonable diligence to procure their attendance, that he has reasonable grounds for believing that their attendance may be procured if

time is given, that the facts he expects to prove by the testimony of the absent witness can not be established so well by any other available witness. In extreme cases continuances will be granted on account of the sickness of the defendant or his counsel or where on account of some temporary local excitement it would be prejudicial to the defendant to be forced to trial. An improper refusal to grant a continuance is an error which will reverse a case in the appellate court if the defendant should be tried and convicted. Where proper affidavits are filed, a continuance may be avoided by the admission of the prosecutor that the absent witness if present would testify to the facts set forth in the affidavits.

§ 681. **Indictment — Information.** — The indictment is a written accusation charging the persons named therein with the commission of a crime, presented on oath by the grand jury. An information is a similar charge not presented by the grand jury but signed by the prosecuting officer. In substance they are the same. Each must charge the defendant named with a specific offense, giving time, place, person and every circumstance so as to inform the accused of the exact nature of the charge he is to answer. In the caption the state and county in which the offense was committed and the name of the court should appear. The indictment must be signed by the prosecuting attorney and indorsed, "A true bill," by the foreman of the grand jury. If a single count in an indictment charges two distinct crimes, it will be bad for duplicity, as where the same count contains a charge of murder and robbery. Where an

indictment in describing the offense follows substantially the language of the statute, it is sufficient.

§ 682. **Pleas to indictment.**—Before entering his plea to the charge against him, the defendant may move to quash the indictment or information for some defect apparent upon the face of it, as if it does not charge the offense properly or is not signed by the prosecutor or indorsed by the foreman of the grand jury, or if the names of the principal witnesses for the prosecution do not appear upon it, or if the date of the offense as charged is subsequent to the finding of the indictment or the filing of the information, or if the date named is beyond the period prescribed by the statute of limitations. What are and what are not sufficient grounds for a motion to quash is ordinarily determined by the statutes of the states. The motion to quash should precede the plea, though the court will allow a plea already entered to be withdrawn and give the defendant leave to move to quash the indictment or information.

§ 683. **Arraignment.**—The arraignment consists of calling the prisoner to the bar by name, reading the indictment to him, and asking him whether he is guilty or not guilty of the offense charged. When thus arraigned he may demur to the indictment, plead either to the jurisdiction, in abatement, a former conviction or acquittal of the same offense, a pardon, or not guilty. If he stands mute and refuses to plead, the court will order a plea of not guilty to be entered. If the defendant pleads guilty, nothing remains for the court to do but to pass sentence. The plea of guilty can be made only by the defendant in person, and in open court. The plea of not

guilty puts in issue all the material averments in the indictment and information.

§ 684. **Jury impaneling.**—The case being put at issue by the plea of not guilty, the impaneling of the jury comes next in order. Most of the states have special statutes directing how jurors are to be selected, and how and for what causes they may be challenged. There are three kinds of challenges, viz.: challenge to the array, which is an objection to the whole body of jurors returned by the sheriff for some irregularity or misconduct on the part of the sheriff; the peremptory challenge, which is an objection to an individual juror without stating any reason, the number of such challenges being limited by law; the challenge for cause, which is an objection to an individual juror on account of bias, partiality, or the existence in his mind of a prejudice against the defendant, or of a preconceived opinion of his guilt, there being no limit to the number of challenges of this kind. The jury is not complete until twelve impartial men are selected. When all challenges are exhausted or waived and the panel is full, the jurors are sworn in open court to try the case.

§ 685. **Opening statements of counsel.**—When the jury are impaneled and sworn, the prosecuting attorney opens the case by stating the substance of the evidence he proposes to submit to the jury. This statement should be full and candid, so as to notify counsel for defense of the case they are expected to meet. Then follows the statement for the defense, or, if counsel prefer, the statement for the defense is postponed until the evidence for the prosecution has been put in. The order of these opening addresses

is a matter within the discretion of the court, except in those states where the statutes prescribe it.

§ 686. **Examination of witnesses.**—The witnesses for the prosecution are then called and examined. It is usual for one counsel only to conduct the direct examination, and one to conduct the cross-examination of each witness. This is a matter of usage however, regulated by the practice of each court. Upon request the presiding judge will allow other counsel in the case to interrogate the witness. Arbitrary rules are not enforced, the object being to get all the material facts before the jury, and the judge is allowed a large discretion in determining the order in which the evidence is to be introduced. It sometimes happens that important facts are within the knowledge of a witness who has been examined and discharged, and which was not elicited upon his examination. Where this appears to be the case the court may allow such witness to be recalled by the prosecution or defense, even after it has been announced that the evidence is all in.

§ 687. **Rules of evidence.**—The general rules of evidence as to its competency and relevancy are the same in criminal as in civil cases; as to the weight and effect of the evidence the rules are different. A bare preponderance of evidence is enough to establish the plaintiff's right to recover in a civil case; in a criminal case every material allegation in the indictment must be proved beyond a reasonable doubt, and every fact necessary to establish guilt must be proved in like manner. In civil cases where one side or the other has produced evidence which *prima facie* establishes a given fact, the burden of proof shifts to the party

against whom the *prima facie* case is made; in criminal cases the burden never shifts, the presumption of the prisoner's innocence follows and shields him throughout the case until the measure of proof establishes his guilt beyond a reasonable doubt. In some states even the presumption of the sanity of the accused does not require him to prove his insanity when that is urged as a defense. It is incumbent on the state to establish his sanity beyond a reasonable doubt, though the general rule in most of the states puts the burden of establishing the defense of insanity upon the defendant. So where the defense of self-defense is urged in behalf of one on trial for homicide or assault and battery, the burden of proof is upon the state to negative it, though in a few states a contrary rule prevails. The same may be said of the presumption of guilt arising against one accused of larceny from the possession of goods recently stolen. Where the state undertakes to establish the guilt of the accused by circumstantial evidence consisting of a chain of facts, every fact essential to the continuity of the chain must be established beyond a reasonable doubt. The rule in such cases is that the facts proved must be absolutely inconsistent with the theory of the innocence of the accused.

§ 688. **Special rules of evidence in criminal cases.**—There are some other special rules of criminal evidence which should be noted. The dying declarations of the victim of homicide, if made when death is imminent and expected by the victim, are competent evidence to prove the circumstances attending the transaction, the name of the slayer, etc. The

voluntary confessions of the accused are evidence against him; when made in open court they are called judicial confessions, and when made elsewhere they are called extra-judicial confessions. When an accomplice turns state's evidence and testifies against his confederates, his evidence is received, but is not enough to establish the guilt of the accused unless it is corroborated by other witnesses or other facts in evidence. When two accomplices testify, the evidence of one can not be considered as a corroboration of the evidence of the other. If the accused is not content with the presumption of innocence which the law allows in his favor, but desires to strengthen it, he may do so by introducing proof of his good character. When he does so, however, the state may meet it by contrary proof.

§ 689. **Final arguments of counsel.**—When the evidence is all in, counsel address the jury. They are required to confine themselves to a discussion of questions of fact, for the court is to charge the jury as to the law of the case. The jury are bound by their oaths to find the facts according to the evidence as given by the witnesses and the law as given to them by the court. In some states, however, the law makes the jury the judges of the law as well as the facts, and where this is the case, counsel have a larger liberty and may argue to the jury that the law is different from that which is given to them by the court. The cases are rare, however, in which counsel resort to this practice. It is common practice in the English courts and in the federal courts for the presiding judge to comment upon and sum up the evidence in his charge, but this is sel-

dom done in the state courts, where the statutes generally require the judge, when so requested, to submit his instructions to the jury in writing.

§ 690. **Conduct of jury—Verdict.**—The rules regulating the conduct of the jury after they retire to deliberate upon their verdict and as to the manner of signing and returning the verdict into court are the same in criminal as in civil cases. The defendant has a right to demand that the jury be polled, which is done by calling each juror by name and asking him if the verdict signed by the foreman is his verdict. If any one of the twelve answers in the negative the whole jury are sent to their room for further deliberation. When it is returned into court the verdict is recorded by the clerk.

§ 691. **Motion for new trial—Arrest of judgment —Execution.**—After verdict the defendant may move for a new trial: (1) For newly-discovered evidence, when it is made to appear that the defendant by the exercise of due diligence could not have produced it at the trial, that the newly-discovered evidence is material and not merely cumulative, that is, tending to make further proof of a fact upon which some evidence was produced at the trial; (2) irregularity in summoning the jury; (3) misconduct of jurors; (4) tampering with jurors; (5) bias or hostility of jurors, which was unknown to defendant when they were accepted and sworn; (6) that the verdict was contrary to evidence; (7) that the verdict was contrary to law. If the motion for a new trial is denied, the defendant may move in arrest of judgment, and to sustain this motion he must show that

there are defects in the record of the proceedings which are not cured by the verdict. If these motions are denied sentence is pronounced and the judgment of the court is executed, unless upon appeal or writ of error a higher court reverses the judgment.

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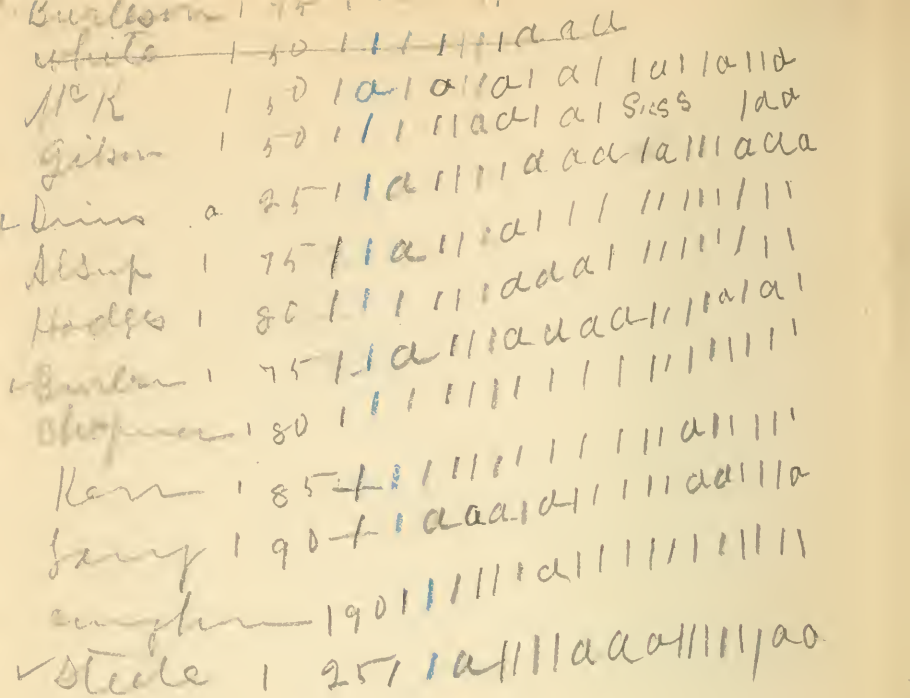

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